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Brexit, the press and the territorial constitution

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Brexit, the press and the territorial constitution

Brexit has unveiled previously hidden aspects of UK society, law and politics. It provides a valuable opportunity to investigate the social reception of law, and in particular the mediation of the law and constitution in the press. The distinctive constitutional arrangements and histories of Wales, Scotland, Northern Ireland and England have given rise to different territorial interpretations of the UK state. These asymmetries have parallels in the UK's territorial media landscape, yet we have little understanding of how this landscape contributes to constitutional discourses.

This paper offers quantitative content and thematic analysis of UK-wide media coverage of major court judgments which have served as critical junctures in the Brexit process. The analysis reveals striking territorial variation in the volume and substance of coverage. Here, the media appears to reinforce divergent understandings of the constitution: while English reporting chimed with a more unitary account of the constitution, reporting elsewhere was more consistent with a vision of the UK as union-state. In light of these findings, we argue that media analysis can make a valuable contribution to our understanding of the law and the constitution.

Key words: Brexit; constitution; media; courts; public law

... England and its constitution are islands of visions. When one widens the angle to look at the constitution of the United Kingdom, rather than just of England, we encounter a sea of conflicting visions. The constitution ... is very hard to pin down. (Feldman, 2005: 331)

1. INTRODUCTION

Whether it distinguishes law sharply from politics and society, or blends legal, political and social elements, no constitutional theory can wholly avoid taking a position on how law relates to politics and society. Constitutional analyses may take a material approach or adopt more mystical perspectives. The former include analyses in a self-styled 'pure legal' mode, albeit those which range beyond the formalities of a particular constitutional text to include a range of constitutional practices (Arato, 2012). By contrast, those who detect a mystical quality to a constitution treat it as embodying the imagined social essence of the polity it constitutes (Kahn, 2010).

Whatever their other differences, we argue that those working in these theoretical traditions tend to share a common, flawed, assumption about the character of nation states: namely, an equivalence between nations and states. In effect they take it for granted that the nation-state is the natural scale at which law, politics and society operate. This assumption is not limited to constitutional or legal scholarship – its influence is pervasive across the social sciences. It can operate at a pre-cognitive level and in ways that structure important bodies of evidence used by researchers (such as the datasets constructed for surveys of social and political attitudes). Although it is hidden beneath a wide range of social and legal research, the generally occluded assumption that the nation-state is the natural scale for social and political life has not evaded notice or critique.

A substantial literature in social and political theory has explored the character and limitations of 'methodological nationalism' (e.g. Cherilo, 2007; Jeffery and Wincott, 2010).

Methodological nationalism implies a normative privileging of states as the political vessels justified in terms of some nation. For us, the particular value of the critique is in the empirical questions it begs. These questions arise when we stop assuming that the nation-state as the scale at which important social and political life takes place, or that states, nations and 'domestic' jurisdictions generally share a single space defined by the same boundaries.

In this article, we examine these themes in the context of the constitutional arrangement of the United Kingdom (UK). We interrogate the complex territorial patterns generated by its legal and political systems and media structure, specifically in response to critical judicial decisions arising in the aftermath of the 2016 majority referendum vote (52%-48%) for the UK to leave the European Union (EU). The referendum and its aftermath – 'Brexit' – have unveiled previously hidden or poorly understood aspects of UK society, law and politics. It thus provides us with an opportunity to investigate aspects of the social reception of law, albeit in a particular and perhaps unusual context. We do so by attending to the mediation of legal and constitutional aspects of Brexit in the press.

The referendum triggered a period of febrile politics, during which the UK's constitutional arrangements often appeared markedly unsettled. During this period, attention came to be focused on the multi-national and multi-jurisdictional character of the UK state. Shortly before calling the Brexit referendum, David Cameron, UK Prime Minister (2010-2016), had talked of 'our ancient democracy' (BBC News, 2014), invoking a mythical vision (or social imaginary (Kahn, 2010)) of venerable constitutional unity. In fact the UK has existed with its current territorial boundaries for less than a century. As well as the UK government and Westminster parliament, for most of this period there has been a sub-state government and legislature in at least one of the UK's constituent territories: in Northern Ireland (NI) until 1972 and in Scotland and Wales since 1999, as well as intermittently in NI from the same date. Today, England is alone in having no national representative institutions of its own.

It has become a commonplace to describe the UK as being made up of four nations: England, Scotland, Wales and NI. Most residents in Britain have some attachment to British identity as well as to (at least one) sub-state national identity: English, Scottish, Welsh. Whether NI is properly described as a nation is open to question; 'nationalists' and 'unionists' identify with Ireland and Britain, respectively, while a significant section of the population choose to not identify with either. Perhaps significantly, the name of the state – the UK – has not generated a label for a state-wide identity: generally we do not talk of 'UKanians' (Nairn, 1988).

Adding further to this complexity, the UK is also made up of three territorial legal jurisdictions. The 1707 terms of union between Scotland and England explicitly preserved the preexisting legal jurisdictions on both sides of the border, which still exist today. If labelling it as a nation is problematic, since its creation in 1921 NI has always been a distinct legal jurisdiction. However, although they are distinct nations and, since 1999 Wales has had devolved political institutions, England and Wales are a single territorial legal jurisdiction. The three jurisdictions, however, are not in a hierarchical relation with one another – they are all on the same normative level. Arguably, the UK Supreme Court (UKSC) is the only judicial institution which sits above the three territorial legal jurisdictions (discounting Scots criminal law).

Particularly since 1999, references to the UK 'territorial constitution' have thus become more widespread. This concept helps to frame discussion of the character and significance of the devolved institutions, relationships between the UK's governments and parliaments, while also touching on questions of multiple national identities and the plural legal jurisdictions.

The UK's territorial constitution is coloured by distinct political interpretations of its form and contents. It is viewed simultaneously as a unitary nation-state, predicated on the sovereignty of the Westminster parliament, and as a union-state, or 'state of nations', dependent on the consent of the constituent territories and their institutions (Douglas-Scott, 2016).

The role of the media in maintaining these understandings is less clear. Well before Brexit, some researchers had noted the critical, though perhaps, under-appreciated role, played by the media in how legal and constitutional events are understood. Media organisations act as 'gatekeepers': they decide which events are reported, to what extent, the prominence given to the decisions involved and the particular issues which they raise, and the sources selected for comment (Sauvageau et al, 2006: 8). Particular actors, decisions or moments may be presented as more important than others, thereby creating 'a context in which change in public opinion is more likely' (Haider-Markel et al, 2006: 66). The press thus shape as well as publicise the political agenda for legal and constitutional reform: they are 'sculptors, and not just reporters, of the public mood' (O'Brien, 2017: 144). The success of the Eurosceptic elements of the London-based press in promoting the UK's relationship with Europe as a matter of the highest constitutional import is a stark example of this potential (Reynolds, 2019).

Like its constitutional arrangements, however, the UK's media landscape is defined by striking territorial diversity. There is a tendency within political and academic discourse to refer to the major London-based newspapers as the 'British' or 'UK' press for shorthand, yet this label conceals both their frequently Anglo-centric content and the existence of sub-state national media elsewhere in the UK (MacInnes et al, 2007). Naturally, the various national publications differ in their territorial focus. King (2007: 11) has previously noted that 'Scottish reporting is increasingly focused on Scotland and Welsh reporting on Wales ... [and] British and UK-wide reporting is increasingly focused on England'. To this extent, they may reinforce a sense of territorial difference in the way the constitution is perceived.

Yet our understanding of how the media engages with constitutional issues is limited. In particular, we have little understanding of the extent to which the press across the UK reflect, obscure or amplify the different visions of the territorial constitution. How much is shared across its legal jurisdictions, political spaces and print media? This paper therefore seeks to interrogate this topic using a systematic approach. Specifically, it provides content and thematic analyses of newspaper coverage across the different nations and jurisdictions of four major court judgments delivered since the referendum which have shaped the constitutional politics of Brexit. The analysis reveals striking territorial variation in both the volume and substance of newspaper coverage. In this particular area of reporting, the print media appears to reinforce divergent understandings of the constitution.

To this extent, our findings reinforce the critique of methodological nationalism. The territorial divergences in coverage underline that law, politics and society do not merely operate at the level of the nation-state – in any case, a contentious concept in the UK

context – but, to varying degrees, at the sub-state, national and jurisdictional levels. UK media and constitutional asymmetries combine to undermine the idea of a single, unified ‘nation’.

The structure of the paper is as follows. Part 2 outlines the existing research on media and constitutions and elaborates why territorial divergences in press reporting might be expected in the context of UK constitutional and media asymmetries. Part 3 sets out the methodology, providing a justification for the choice of judgments and methods of data collection and analysis. The remaining sections focus on the results: Part 4 provides the findings of the content analysis of all articles sampled, while Part 5 explores the major themes which emerged from the qualitative analysis of the opinion pieces. Part 6 provides the concluding remarks and reflections for future research in this area.

2. CONSTITUTIONALISM AND THE PRESS

Scholarship on media coverage of the courts

In the UK, media engagement with constitutional law judgments has received limited attention. In fact, research into UK media coverage of judicial decisions has been very limited in general. In an extensive review of the literature, Moran (2014a) observed that the scholarship had focused overwhelmingly on the coverage of criminal courts and representations of crime, criminality and policing, and there had been no attempt to study systematically the coverage of particular courts (Moran, 2014: 147-148).

Subsequently, scholarship has emerged on the media’s role in debates around human rights (e.g. Farrell et al, 2019). However, there has been little research on the media in respect of other types of public law, including cases with a bearing on the territorial constitution. The principal exception is the High Court of England and Wales decision in *R (Miller) v Secretary of State for Exiting the European Union* [2016] WLR(D) 564. The Court ruled that an Act of Parliament was required to authorise the notification of withdrawal, prompting an unprecedented level of media criticism, which, in turn, scholars have analysed (Breeze, 2018; Reynolds, 2019). We offer a novel contribution to this small literature, which addresses the important territorial dimensions of the case and its reception from non-London media standpoints.

Moran’s (2014a) study provides important insights. In a ‘snapshot’ of press coverage of the courts in England and Wales during ‘an unexceptional day in the life of the justice system and the Press’, he found considerable variety in terms of the courts, decisions and types of case covered by newspapers (Moran, 2014a: 146). This suggests that variation in coverage is the norm for court reporting. He also observed, however, that the regional papers closest to courts tended to report the cases more rigorously than the major London titles. He therefore concluded that ‘...the ability of an attentive member of the public to scrutinise the activities of the courts will be subject to variation depending upon the national and regional Press that is read’ (Moran, 2014: 166).

The importance of media geography is also underlined in the international scholarship on coverage of judicial decisions. In the Canadian context, researchers found that English-language media pays far more attention to the decisions of the Supreme Court than the Quebec media; the latter is more attentive when Quebec cases and personalities were

involved. These trends, they argued, 'reflect the political values that predominate in Quebec and English Canada (Sauvageau et al, 2006: 227). Similarly, in the USA, Haider-Merkel et al (2006) found that the factual or legal salience of a constitutional case to a particular state was likely to generate more media coverage within that state.

The same trends are also reflected in wider reporting on political and constitutional matters. In the European context, for example, research suggests that media in EU member states most closely integrated with the bloc tend to accord the most salience to EU level decision-making in their coverage (Pfetsch et al, 2010: 168). Similar patterns are also found within multi-level states. Studies of reporting in Scotland and Catalonia, for example, show that their indigenous press have devoted far more coverage and salience to the question of political independence than the media elsewhere in the UK and Spain, respectively (Blain et al, 2016; Micó and Carbonell, 2017).

These geographical patterns matter. If we accept that constitutions have mystical as well as formal qualities – that they provide a manifestation of the 'nation' – the media performs a critical role. In the UK context especially, where no formal document of fundamental principles and rules exists, it is difficult to observe *the* constitution; the public must rely on political actors and the media to relay and interpret relevant events. The substance of reporting on constitutional matters may, however, serve to reinforce or alter particular territorial world-views.

The cultural dominance of media focused on such matters at the level of the nation-state, for example, may preclude the development of alternative, sub-state constitutional cultures (Kahn, 1993). By adopting alternative perspectives, however, media may contribute to the construction of political communities both above and beneath the nation-state. European scholarship observes how media can orientate national politics beyond the state; indeed, they can contribute 'to differing levels and degrees – to the Europeanization of national public spheres' (Pfetsch et al, 2010: 168). Likewise, authors in the USA argue that local press can perform a similar role below the level of the nation-state; by drawing attention to distinctive interpretations of the constitution at the state level, they can foster constitutional cultures below the federal tier (Long, 2006).

Asymmetries in the UK constitution

The introduction alluded to the various reasons why we might expect the press situated in different parts of the UK to differ in the way that they engage with legal and constitutional events. Across the nations and jurisdictions, diverse and evolving institutional arrangements are accompanied by different territorial readings of the constitution. Additionally, the sub-state national media vary both in their territorial focus, their size and their resources. It is useful to elaborate on these points further.

In Wales, the National Assembly has progressed from an executive body with secondary law-making powers to a 'fully legislative' institution with primary law-making powers under a reserved powers model (Rawlings, 2015: 475), albeit one constrained by extensive reservations not seen elsewhere. By contrast, the Scotland Act 1998 delivered a more coherent package of legislative devolution to Scotland from the offset. The original competences have since been expanded under the Scotland Acts of 2012 and 2016 in particular, which devolved powers over income tax and welfare, among others. In the case

of NI, the Belfast / Good Friday Agreement and subsequent NI Act 1998 established a political system of consociational governance and a distinctive model of devolution. England, however, has no experience of national devolution. As McHarg (2018: 284) explains, the UK government (UKG) and Westminster parliament serve 'by default ... [as] English institutions in areas devolved to Scotland, Wales and [NI]'.

These arrangements have provided the foundations for different constitutional visions. They are symptomatic of what Sandford and Gormley-Heenan (2018: 2) term 'Schrodinger's devolution': a constitutional condition in which supposedly permanent devolved institutions with increasing autonomy co-exist with a Westminster parliament of unlimited sovereignty.

The UKG, operating through a legislature free from the legal constraints imposed elsewhere under the devolution statutes, exhibits a unitary view of the constitution predicated on Westminster parliamentary sovereignty (Douglas-Scott, 2016; McHarg, 2018). The devolved governments, by contrast, display a consent-based, or union-state, interpretation of the UK state, albeit in different ways. The WG understands the UK as a 'voluntary association of nations' requiring parity and mutual respect between the four governments (WG, 2017). The Scottish Government (SG) invokes a historical claim of the popular sovereignty of the Scottish people, one which 'denies that the Union of 1707 created a sovereign parliament that reflected only English traditions of sovereignty' (Keating, 2018: 167; SG, 2016). In NI, the principle of consent regarding its constitutional status as part of the UK, established in the Belfast / Good Friday Agreement, is viewed by many as having displaced Westminster parliamentary sovereignty as the foundation of the constitutional order (Agnew, 2016).

Asymmetries in the UK media landscape

The asymmetries in the UK constitution find parallels in the media landscape. Previous research has found that many of the self-styled 'national' versions of the major London-based titles, perhaps reflecting the amalgam of UK-level and English governance, 'remain largely English in tone and rhetoric' and devote little attention to events outside of England (Williamson and Golding, 2016: 111). The distinction between English and UK-wide news is often obscured or ignored, sometimes consciously so. In early 2016, for example, as the referendum on EU membership loomed, a front page in the *Daily Mail* (2016) pondered, 'who will speak for England (and, of course, by 'England' ... we mean the whole of the United Kingdom)?' (Henderson et al, 2016).

A study by Williamson and Golding (2016: 110) observes how the Scottish independence referendum – not an insignificant constitutional event for the UK – was covered by the London-based press 'as a relatively foreign event taking place in another country ... [I]nterest ... was at a level and of a form common to much overseas news'. Recent research on the London media's coverage of the Brexit referendum provides another case in point. An extensive study of nearly 15,000 news items appearing in the major London-based publications during the ten-week referendum campaign found that only 5% mentioned devolution, compared with the economy (48%) and immigration (30%) (Moore and Ramsay, 2017: 37). Viewed in this light, the memorable essay title of MacInnes et al (2007), 'Where is the British national press?', resonates.

Scotland and NI boast several indigenous titles, as well as Scottish / NI editions of the London-based papers which have greater focus on Scottish / NI issues and, in some

instances, very different editorial stances (e.g. the Conservative-supporting *Sun* and SNP-supporting *Scottish Sun*). By contrast, the only self-styled national paper in Wales is the *Western Mail*, albeit with a readership confined to South Wales, and there are generally no Welsh editions of the London titles. At the same time, there is little reporting of Welsh political issues on a UK-wide basis (Johnson, 2017). Powell (2016: 122) therefore argues that 'most people in Wales buy newspapers which are produced in London and often present stories through the prism of England'.

Asymmetries in coverage of constitutional law cases?

With distinctive constitutional arrangements and discourses aligning with a varied media landscape, it is reasonable to anticipate different patterns of media engagement with constitutional law cases.

Of course, media reporting is influenced by a variety of factors: the subject interests of individual journalists, the perceived expectations of the readership, and the political, strategic and commercial priorities of the media organisation (Sauvageau et al, 2006: 64). Various changes in recent years have drastically altered the media landscape and added to this unpredictability. A decline in the number of journalists, in particular specialist court reporters, has limited media capacity for reporting on judicial proceedings, while intense competition, digitalisation and the twenty-four hour news cycle have in many instances incentivised sensationalism and churn over accuracy and detail (Moran 2014b: 201).

Equally, given the importance of media geography underlined by the existing scholarship, territorial trends in the UK context seem likely. Indeed, in view of its constitutional and media asymmetries, we might expect certain patterns. McHarg points out that the unitary conception of the UK state is 'the lived reality for the vast majority of the UK's population resident in England' (McHarg, 2018). Newspapers based in England are likely to reflect this reality. Indeed, the previous research observing the England-orientated content of the London press may be indicative of a tacit reinforcing of a view of the UK as a unitary state. Thus, in the London-based titles, we might anticipate lower engagement with judgments turning on points of devolution.

We could also expect newspapers situated in nations with devolved governance to exhibit a different tendency. Patterns of court reporting are unlikely to translate neatly into a union-state view of the constitution, given that newspapers outside of England will have their own commercial priorities and constitutional preferences for the future of the UK. Nevertheless, outside of England we could still expect much greater media interest in court cases raising devolution issues given the obvious relevance of such cases for governance in those areas. Equally, given the relative weakness of the Welsh media landscape, we might also anticipate lower levels of reporting and commentary among Welsh newspapers.

3. METHODOLOGY

Quantitative content and thematic analyses

This research deploys a mixed methods analysis of the newspaper coverage of four, major judgments across each of the UK's constituent nations and jurisdictions. Articles from eight publications were compiled from the weeks that the judgments were handed down:

1. 24-30 January 2017: *Miller* (UKSC)
2. 14-20 May 2018: *Buick* (NIHC)
3. 10-16 December: *Wightman* (CJEU)
4. 13-19 December: *Scottish Continuity Bill* (UKSC)

The eight publications were sampled on the basis of nation / jurisdiction, constitutional and political leanings and availability on the Nexis database, with two titles selected for each territory: *Western Mail* (Wales), *Daily Post* (Wales), *Belfast Telegraph* (NI), *Irish News* (NI), *Daily Mail* (England), *Independent* (England), *Herald* (Scotland) and the *Scotsman* (Scotland).

All articles sampled were examined using quantitative content analysis and the opinion pieces were also thematically analysed. Content analysis is used to 'identify and count the occurrence of specified characteristics or dimensions of texts', thereby allowing researchers to draw observations about their social significance and the 'realities which they reflect' (Hansen and Machin, 2013: 89). It is concerned with the manifest content of texts: 'with *what* is said rather than *how* it is said' (Tonkiss, 2004: 368).

All items were coded by newspaper, article type (news / opinion), nation / jurisdiction of the newspaper (i.e. Wales, England, etc.) and the particular judgment referenced. Beyond this, the content analysis focused on specific features of the coverage of the *Miller* judgment, which constituted the overwhelming proportion of the sample. Each *Miller* article was coded according to which issues (parliamentary sovereignty / devolution / both / neither) and the constitutional principles (parliamentary sovereignty; devolved legislative consent, or 'Sewel Convention'; royal prerogative) mentioned. All coding was entered manually into an SPSS file for statistical analysis.

The opinion articles were qualitatively analysed for major themes. Thematic analysis, by contrast, is a process of 'identifying, analysing and reporting patterns ... within data' (Braun and Clarke, 2006: 79). A theme 'represents some level of patterned response or meaning within the data set', based on a combination of spatial 'prevalence' within individual texts and across the wider dataset, and researcher judgment (Braun and Clark, 2006: 82). The combination of these methods enabled a holistic examination of media text, whereby the quantitative patterns observed could be further explored.

Judgments selected: four critical moments

The four judgments emerged in the political aftermath of the 2016 referendum and have influenced the constitutional politics of Brexit. The first is the UK Supreme Court's (UKSC) judgment in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. There a historic 11-judge panel ruled on two sets of issues. On the first – what the Court termed

the 'main issue' – an 8:3 majority held that the royal prerogative (the residual powers of the Crown, now largely exercised by the government) did not provide the UKG with the legal authority to initiate the process of withdrawing the UK from the EU under Article 50 TEU: an Act of Parliament was required. On the second – what the Court called 'devolution issues' – it ruled unanimously that the principle of devolved legislative consent, known as the 'Sewel Convention' (by which the UK Parliament will not normally legislate in relation to devolved policy competences without the consent of the devolved legislatures), was non-justiciable. There was therefore no legal requirement for their consent to triggering Article 50.

The second judgment is *Re Buick's application for judicial review* [2018] NIQB 43. There, the High Court of NI ruled in May 2018 that senior civil servants did not have the legal authority to act in the absence of a minister (in this instance, concerning the approval of a controversial planning application for an incinerator). With power-sharing having collapsed in January 2017, the effect of the ruling was to 'plunge the governance of [NI] into paralysis' (Deb, 2019: 259). Unlike the other judgments selected, this particular ruling did not bear directly on either the internal or external dimensions of the Brexit process. Nonetheless, the judgment of the High Court (and NI Court of Appeal) had significant constitutional implications, prompting UKG to legislate to enable NI civil servants to continue to act in the absence of ministers and thereby ensure continued governance.

The third case is *Wightman v Secretary of State for Exiting the European Union* (C-621/18), decided by the Court of Justice of the EU in December 2018. There it was ruled that an EU member state had the authority under Article 50 TEU to unilaterally withdraw its notification of withdrawal in accordance with national constitutional requirements, in effect allowing the UK to 'cancel' Brexit. *Wightman* did not raise any devolution issues. However, having percolated through the Scottish legal system and UKSC before finally reaching the CJEU, there was an important territorial dimension to the case.

The final judgment is the UKSC decision in *Re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 ('*Scottish Continuity Bill*'), also decided in December 2018. The case was the culmination of a major political dispute between the UK and Scottish governments regarding the former's approach to legislating for EU withdrawal. The 'Continuity Bill' provided for the continued application of EU law in areas of devolved competence after the UK's exit and provided Scottish ministers with the power to adjust this body of law. The Court ruled that most of the bill was within the competence of the Scottish Parliament at the time it was passed. However, the intervening enactment of the European Union (Withdrawal) Act 2018 at Westminster had superseded it by modifying the competences of the Scottish Parliament under the Scotland Act 1998. McHarg and McCorkindale (2019: 196-7) note that the ruling demonstrated 'vividly ... the constitutional vulnerability of devolved institutions which owe their existence and powers to nothing more than statute'.

Young (2019) observes how the courts through several of these cases have performed 'a key role in the Brexit process. ... [T]heir decisions have had political ramifications and suggest a growing role for the courts in the shaping of the UK constitution'. They therefore provide illuminating moments to observe UK-wide media engagement with constitutional issues. We turn now to the results from this approach.

4. CONTENT ANALYSIS: RESULTS

i. Overall coverage

The overall sample consists of 169 articles. As shown in Figure 1.1, there was considerable variation in the level of reporting across the different publications. Overall, the *Independent* (England) produced the largest share of the coverage (33 reports) while the *Daily Post* (Wales) produced the smallest (4 reports).

Figure 1.1 – Reports by newspaper

Newspaper	Reports (N)
Independent	33
Herald	30
Scotsman	26
Daily Mail	22
Belfast Telegraph	20
Irish News	20
Western Mail	14
Daily Post	4
Total	169

Figure 1.2 – Reports by nation / jurisdiction

Nation / jurisdiction	Reports (N)
Scotland	56
England / UK	55
Northern Ireland	40
Wales	18
Total	169

Condensing the data by territory, Figure 1.2 shows that the Scottish and English publications accounted for the largest share of the coverage (56 and 55 reports, respectively) followed by the NI and Welsh outlets (40 and 18 reports). Figure 1.2 also illustrates the low volume of Welsh reports compared with the other nations / jurisdictions.

Figure 1.3 shows that these patterns were mirrored in both news and commentary items, with the Scottish and English publications leading in both categories, followed by the NI and Welsh publications. With just 3 opinion pieces between them, the Welsh titles accounted for the smallest share of commentary.

Figure 1.3 – Reports by article genre and nation / jurisdiction

	England / UK	Wales	Scotland	Northern Ireland
Event	36	15	36	25
Opinion	19	3	20	15
Total	55	18	56	40

ii. Coverage of judgments

The level of coverage for each judgment varied dramatically. Figure 2.1 shows that *Miller* was overwhelmingly the most reported decision (115 reports), accounting for more than two

thirds of the articles sampled. It was followed by *Wightman* (27 reports), *Buick* (20 reports) and the *Continuity Bill* judgment (7 reports).

Figure 2.1 – Reports by judgment covered

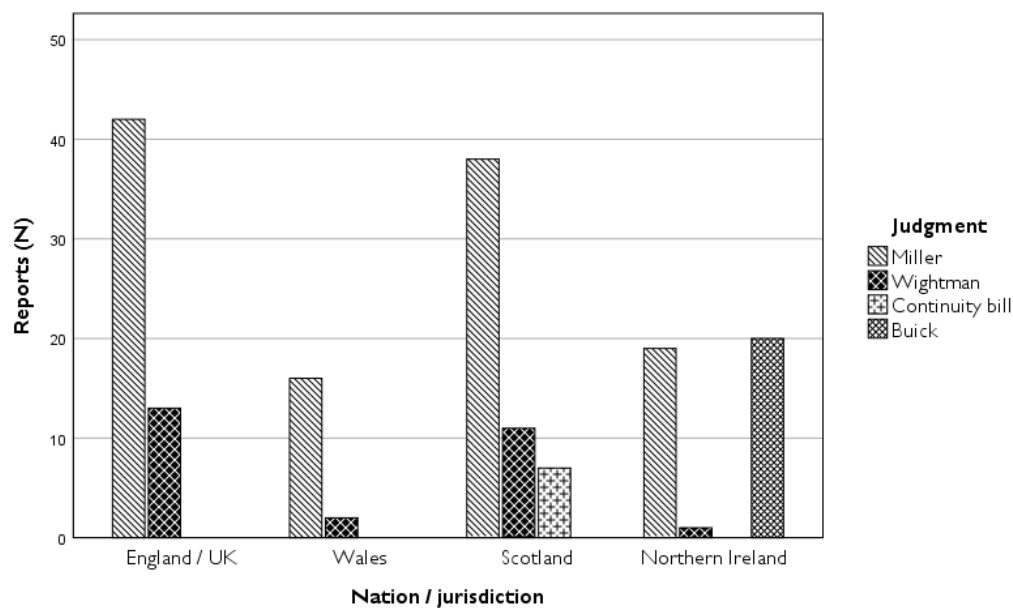
Judgment	Reports (N)
Miller	115
Wightman	27
Buick	20
Continuity bill	7
Total	169

The coverage of *Miller* was exceptional in other ways. Figures 2.2 and 2.3 below demonstrate that it was the most extensively covered judgment across each of the territorial spaces, with the exception of the NI titles. Figure 2.2 also shows that the English titles produced the most reports on *Miller* (42 reports), followed narrowly by the Scottish publications (38 reports). By contrast, the NI and Welsh titles produced less than half the number of reports produced by the English titles (19 and 16 reports, respectively).

Figure 2.2 – Reports by nation / jurisdiction and judgment covered

	Miller	Wightman	Continuity bill	Buick
England / UK	42	13	0	0
Wales	16	2	0	0
Scotland	38	11	7	0
Northern Ireland	19	1	0	20
Total	115	27	7	20

Figure 2.3 – Reports by nation / jurisdiction and judgment covered



Beyond *Miller*, more notable divergences emerge in the patterns of judgment coverage. Like *Miller*, *Wightman* was covered in each of the territories, though to a considerably lesser extent than *Miller*. Like *Miller*, *Wightman* also received the most coverage in the English titles (13 reports), followed narrowly by the Scottish publications (11 reports), while there were far fewer in the NI and Welsh publications (1 and 2 report(s), respectively).

The other two judgments revealed even more striking differences. Coverage of the *Buick* judgment on civil service decision-making in NI was confined solely to the NI publications, where it also received roughly the same level of coverage as *Miller* (20 and 19 reports, respectively). By contrast, the judgment received no coverage in any of the other titles sampled. A similar trend was also apparent with the *Continuity Bill* judgment, with coverage confined solely to the Scottish publications sampled.

iii. *Miller* reports: legal issues mentioned

As discussed earlier, the *Miller* judgment addressed two sets of questions: the ‘main issue’ of the prerogative and Parliamentary sovereignty, and the ‘devolution issues’. As Figure 3.1 below shows, the reports did not cover these issues equally. Overall, there was roughly the same number of reports referring to the main issue alone (37 reports) as there were reports referring to both issues (36 reports). A smaller proportion of the reports referred to the devolution issue alone (24 reports), while some reports referred to neither issue (18 reports).

Figure 3.1 – Miller reports by legal issue(s) mentioned

Issue(s) mentioned	Reports (N)
Sovereignty only	37
Both issues	36
Devolution only	24
Neither issue	18
Total	115

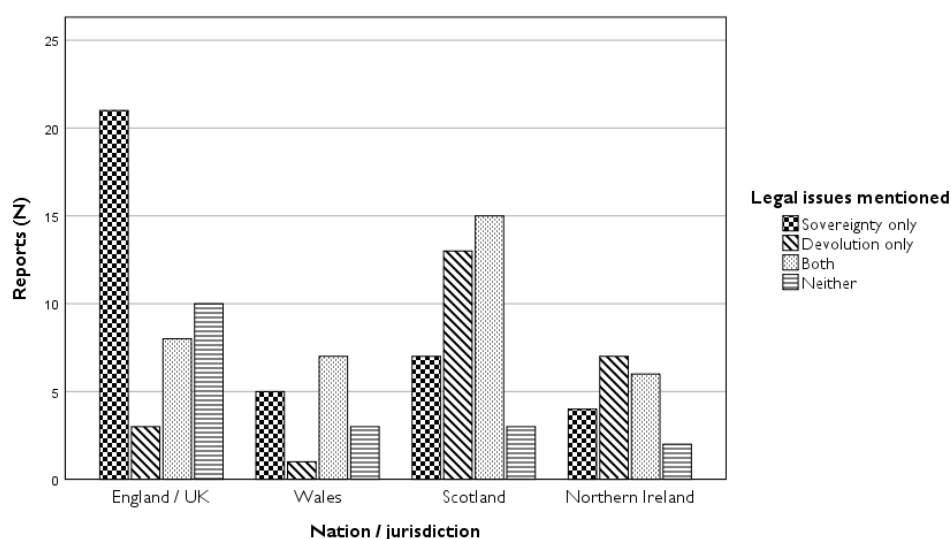
Here again, there were notable divergences between territories in terms of which aspects of the judgment featured in the reports, if at all.

Figure 3.2 Miller reports by nation / jurisdiction and legal issue(s) mentioned

	Sovereignty only	Devolution only	Both issues	Neither issue	Total (nat. / juris.)
England / UK	21	3	8	10	42
Wales	5	1	7	3	16
Scotland	7	13	15	3	38
Northern Ireland	4	7	6	2	19
Total	37	24	36	18	115

In the English titles, half of the *Miller* coverage (21 reports) referred only to the main issue and there were considerably fewer articles referring either to both issues (8 reports) or the devolution issues alone (3 reports). Elsewhere, however, far greater attention was paid to the devolution issues. In the Scottish titles, most of the coverage referenced either both of the issues (15 reports) or the devolution issue only (13 reports). Similarly, most of the NI coverage of *Miller* referred either to both issues (6 reports) or to the devolution issue only (7 reports). Welsh coverage differed somewhat, generally referring either to both issues (7 reports) or to the main issue alone (5 reports). Figure 3.3 below illustrates these divergences in issue coverage.

Figure 3.3 – Miller reports by nation / jurisdiction and legal issue(s) mentioned



iv. Miller coverage: constitutional principles referenced

Finally, territorial divergence was also manifest in the constitutional principles which appeared explicitly in the *Miller* reports. Figures 4.1, 4.2 and 4.3 show that Parliamentary sovereignty (PS) and devolved legislative consent (DLC) each appeared in the same number of reports (27), while the royal prerogative appeared in notably fewer (15 reports).

Figure 4.1 – Miller reports with explicit references to parliamentary sovereignty

	Reference to PS?		Total (nat. / juris.)
	Yes	No	
England / UK	11	31	42
Wales	6	10	16
Scotland	6	32	38
Northern Ireland	4	15	19
Total	27	88	115

Viewed in territorial perspective, the English publications produced the most articles referring to PS (11 reports), followed jointly by the Welsh and Scottish titles (6 reports each), while the NI coverage contained the fewest (4 reports). However, as a proportion of their respective national coverage, the Welsh publications had the largest share of articles referring to PS (38%), followed by the English (26%) and NI (21%) publications, while the Scottish publications had the lowest proportion of articles referring to PS (16%).

Figure 4.2 Miller reports with explicit references to devolved consent

	Reference to DC?		Total
	Yes	No	
England / UK	3	39	42
Wales	2	14	16
Scotland	19	19	38
Northern Ireland	3	16	19
Total	27	88	115

By contrast, Figure 4.2 shows that the Scottish titles produced the most reports referring to DLC (19), accounting for half of their combined *Miller* coverage. Meanwhile, there were just 2-3 reports from each of the other territories. This equated to 16% of NI reports on *Miller*, 13% of the Welsh reports and just 7% of the English reports. This is particularly noteworthy given that the English publications accounted for the largest number of reports on *Miller*.

Figure 4.3 Miller reports with explicit references to royal prerogative

	Reference to RP?		Total
	Yes	No	
England / UK	5	37	42
Wales	4	12	16
Scotland	3	35	38
Northern Ireland	3	16	19
Total	15	100	115

Figure 4.3 indicates that there were fewer articles referring to the prerogative across all of the territories. The English newspapers produced the most (5 reports), followed by the Welsh (4 reports) and then Scottish and NI outlets (3 reports each).

v. Content analysis: discussion

Several conclusions can be drawn from the analysis. First, there are significant territorial disparities in the volume of press reporting on constitutional law cases. Whereas the English and Scottish titles each accounted for a third of the reports sampled, the Welsh titles amounted roughly to only a tenth. Given that the *Daily Post* was the only regional outlet selected, this was to be expected. Nevertheless, it underlines the limited capacity of the traditional Welsh newspapers to contribute to constitutional discourses on important court judgments. The data also underlines the uniqueness of *Miller* as a legal event, attracting coverage in each of the four territorial spaces and generating a higher volume of reports than the other three judgments combined.

Third, there are notable territorial divergences in the press coverage given to particular constitutional law cases. This is consistent with the wider international literature in this area (e.g. Sauvageau et al, 2006; Haider-Merkel et al, 2006; Moran, 2014a). Both *Miller* and *Wightman* received UK-wide coverage, perhaps underlining a shared perception of their constitutional significance. Conversely, both *Buick* and the *Continuity Bill* judgments were only reported in the jurisdictions from which they emerged. In one sense, this is unremarkable:

the scholarship in this field tells us that the press tends to report more diligently the legal and political events which have some relevance to their jurisdiction, whether due to factual origin or legal consequence. Yet the divergence in coverage, particularly in relation to the *Buick* decision, is striking. In NI, the level of reporting suggests this was a constitutional event on par with the *Miller* ruling; elsewhere, it went unnoticed, at least by the publications sampled here.

The data on *Miller* coverage also suggests that media across the UK focus on different constitutional issues raised by court judgments, even in the context of the same case. Consistently with previous research noting the more Anglo-centric content of the London-based publications, the English reports paid far more attention to the issue of parliamentary sovereignty and prerogative power and less attention to the devolution issues. By contrast, reports in the Scottish, NI and Welsh publications gave more attention to the devolution issues, relative to their overall reporting.

It would also appear that constitutional principles have different levels of visibility in the media across the UK. Thus parliamentary sovereignty featured more often in the English and Welsh reports on the *Miller* judgment than in the Scottish and NI coverage. By contrast, devolved legislative consent featured far more frequently in the Scottish reports than anywhere else, perhaps underlining a more prominent place in Scottish political discourse in the aftermath of the 2014 referendum.

5. QUALITATIVE ANALYSIS: THEMES

Together, the quantitative patterns observed suggest that different accounts of the constitution are presented in media across the UK. The patterns of English reporting are more consistent with a view of the UK as a unitary state, with relatively little attention given to devolution matters. Reporting elsewhere, by contrast, offers a picture of a more complex, multi-layered union-state.

This next part of the article interrogates these patterns further. Inevitably, the themes emerging from the commentary are shaped by the particular judgments which received the most coverage in each territory. As seen earlier, in the English, Welsh and Scottish newspapers, *Miller* accounted for the large majority of coverage, whereas reporting in NI was split roughly equally between *Miller* and *Buick*. Thus the three themes explored below centre principally on these two judgments.

i. Democracy in tension

The first major theme is *democracy in tension*. There were two dimensions to the theme, with varied territorial prevalence.

England / UK: representative v. direct democracy

The first dimension was a tension between representative democracy – elected representatives in Westminster acting and voting on Brexit issues according to their beliefs – and direct democracy, as expressed in the overall UK-wide referendum vote to leave the EU. This was the dominant theme emerging from the commentary in the English publications, where the *Independent* and *Daily Mail* expressed polarised positions in response

to the *Miller* ruling that an Act of Parliament was required to authorise the triggering of Article 50.

Commentary in the *Independent* welcomed the ruling as an important parliamentary check on government. An editorial applauded the judges as ‘allies of the people’ who had ‘strengthened the rights and privileges of Parliament against those of the Crown’ (*Independent*, 2017a). Several other contributions on *Miller* called for parliamentarians to act according to their views rather than deferring to the referendum result alone (e.g. Robertson, 2017; *Independent*, 2017b). By contrast, an editorial in the *Daily Mail* (2017) argued that *Miller* was ‘a bad day for democracy’, providing ‘a weapon to Remoaners ... determined to frustrate the will of the people’. In the *Mail*’s view, the outcome of the referendum was constitutionally sacrosanct, providing the legitimate basis for UKG to initiate the Brexit process unhindered by the UK Parliament: ‘... the 17.4 million votes for Leave gave the PM all the authority she needs to trigger Article 50’.

The polarisation between the *Independent* and *Daily Mail* was also expressed in different views as to the authority of the overall, UK-wide referendum result. For the *Daily Mail* (2017), the 52% majority for ‘Leave’ constituted unambiguously ‘the will of the people’. By contrast, an editorial in the *Independent* (2017a) argued that the referendum vote was one of ‘principle’, won on a ‘narrow margin’, and the authority of which did not extend to the outcome of negotiations. Another opinion piece went much further, claiming that only 37% of the eligible electorate voted to leave and the referendum was, in any event, ‘non-binding’ (Robertson, 2017).

Scotland and NI: which result counts?

The second dimension to *democracy in tension* concerned the authority of the different territorial outcomes of the referendum. This surfaced in the Scottish and NI commentary on *Miller*, where there were stark differences of opinion. An editorial in the *Belfast Telegraph* (2017), for example, argued that ‘[w]hile [NI] voted to remain in the EU, it must abide by the decision of the UK-wide electorate to leave’. Similarly, commentary in the *Scotsman* rejected the notion that the vote to remain in Scotland required special weight. An editorial (2017) argued that ‘[t]here ... should not be any attempt to block what the majority of the people of the UK voted for’ (also Jamieson, 2017). Another opinion piece applauded as ‘common sense’ the ruling that ‘the consent of the three devolved legislatures is not required in order to act upon the instruction of a UK-wide referendum’ (Wilson, 2017).

Other NI and Scottish commentary, however, took the opposing view. One piece in the *Belfast Telegraph* argued that the Brexit-supporting Democratic Unionist Party ‘does not have a mandate to represent [NI] on Brexit’ because its electorate ‘voted for Remain by 56%-44%’ (Kane, 2017). Similarly, an editorial in the *Herald* (2017) lamented that the *Miller* ruling on the Sewel Convention meant the ‘the UK government can simply plough ahead with Brexit whether ... the Scottish people, who voted by 62 per cent to remain in the EU - like it or not’.

ii. The configuration of territorial power

The second theme is the *configuration of territorial power*. This emerged in response to the *Miller* ruling on the non-justiciability of the Sewel Convention. While it had some prevalence in the NI and Welsh commentary, it was especially prominent in the Scottish newspapers.

In the *Herald*, a number of articles claimed that the ruling had effectively re-concentrated territorial power at the UK level, rendering the powers and long-term position of the devolved institutions more uncertain: 'Holyrood's legislative powers are clearly and explicitly on loan from Westminster and liable to be over-ridden as and when the UK Government chooses' (Macwhirter, 2017b). As such, it was 'no longer a parliament in anything but name'.

The 2014 independence referendum and its aftermath provided the context to these concerns. For several *Herald* commentators, the UK Union had been sold to the Scottish electorate on the promise of a legally entrenched Scottish parliament and a more federal constitutional arrangement, both of which had been undermined in the wake of Brexit. The Scotland Act 2016, which had placed the Sewel Convention on a statutory basis, had been 'disingenuously drafted' to give the false impression of 'a legal obligation for Holyrood to give its assent to changes to its powers' (Macwhirter, 2017a). The *Miller* ruling had also underlined the continuing, non-federal nature of the UK's constitution (Keating, 2017). It had demonstrated that 'the Scottish Parliament does not exercise sovereignty, relative or absolute' while 'the UK Union ... is being strengthened and turned into something more monolithic' (Macwhirter, 2017a).

Other Scottish articles, however, argued that *Miller* had simply affirmed the well-established constitutional position based on the sovereignty of the Westminster parliament. A *Scotsman* editorial (2017) opined that it was 'easy to follow the legal logic' of the ruling, since the UK's relationship with the European Union is a matter reserved to UKG under the Scotland Act 1998. Another comment in the *Scotsman* argued that the ruling was 'common sense', as underlined by the unanimity of the decision (Wilson, 2017). Similar sentiments were echoed in the *Herald*: 'Holyrood is what it has always been: a devolved parliament'; the ruling 'did not add to our knowledge ..., merely repeat it' (Gordon, 2017).

However, there was shared recognition of the political difficulties created by the decision. As one *Herald* article noted, 'It's one thing to know, intellectually, that Westminster is sovereign; it's another to see the hierarchy of power so naked' (Gordon, 2017; also Gourtsoyannis, 2017). Further, commentary in both Scottish titles noted that the ruling rendered a constitutional dispute more likely, particularly in the context of discussions over the distribution of 'repatriated' powers (Keating, 2017; Macwhirter, 2017a).

Coverage elsewhere was mixed on this issue. One piece in the *Belfast Telegraph*, also reprinted in the *Independent*, expressed the same unease with the ruling as the balance of commentary in the *Herald*. It had exposed the 'depth of desperate voicelessness suffered by all the devolved nations' (Walker 2017a; 2017b). It was particularly critical of the reasoning in *Miller* that the consequences for a breach of constitutional convention are political rather than legal, since 'no one will be subjected to a political defeat, or a loss of office, in Westminster as a consequence of completely neglecting us' (Walker 2017a; 2017b).

While other articles sampled from NI and Wales did not make the point as forcefully, there was a clear recognition of a loss of political leverage for devolved institutions. Commentary in the *Irish News* observed that the ruling had rendered special status for NI within the EU less likely (*Irish News*, 2017; Murphy, 2017), while articles in the *Belfast Telegraph* and *Western Mail* emphasised the renewed importance for NI and Welsh representatives in Westminster during the Brexit process (*Belfast Telegraph*, 2017; Kane, 2017; *Western Mail*, 2017).

By contrast, there was little discussion of the issue of the Sewel Convention in the English commentary. Opinion in the *Independent* suggested that there would be relief in Whitehall 'that devolved assemblies have no right to throw spanners in the Brexit works' (Robertson, 2017); the ruling had removed 'the last plausible obstacle' to triggering Article 50 (Rentoul, 2017). For the *Daily Mail* (2017), the ruling provided a measure of consolation that 'it could have been worse'.

iii. NI: stasis of the ungoverned

The third and final theme – emerging solely from the NI commentary on *Buick* – was the *stasis of the ungoverned*. Despite their different political leanings, commentary in *Irish News* and the *Belfast Telegraph* was characterised by near unity of opinion. A sense of despair ran through both publications, with editorials lamenting the state of 'chaos and uncertainty' (*Belfast Telegraph*, 2018) and 'an unacceptable situation ... [getting] worse' (*Irish News*, 2018). Neither considered likely the imminent restoration of power-sharing. Both were critical of inaction by UKG, in particular the Secretary of State for NI, Karen Bradley. Above all, opinion in both publications stressed the adverse consequences of the governance vacuum: neglect of urgent policy issues, economic stagnation, reputational damage to NI, growing public distrust of the civil service and collapsing faith in the political process. Both publications questioned how governance and society in NI could continue to function in the absence of elected government and called for urgent solutions (*Belfast Telegraph*, 2018a; 2018b; 2018c; Breen, 2018; *Irish News*, 2018a; 2018b; 2018c). As seen earlier, however, the *Buick* judgment was not covered by any of the other publications sampled. At this instance at least, this was a conversation for NI alone.

6. CONCLUSION

This article has presented a mixed methods analysis of UK-wide press coverage of some of the judgments which have shaped the constitutional politics of Brexit. At one level, it underscores the uniqueness of the UKSC *Miller* ruling in media reporting on constitutional law cases. More importantly, the analysis reveals striking territorial disparities in the volume and substance of press coverage of constitutional law cases across the UK, manifesting in very different accounts of the territorial constitution. The English reporting was more consistent with a unitary view, while in the other nations and jurisdictions reporting chimed with a more nuanced, union-state account of the constitution. Yet the picture differed significantly between Scotland, NI and Wales.

This suggests that newspapers across the UK both reflect and reinforce wider, divergent understandings of the constitution, adding a further layer of complexity to the sea of conflicting visions within UK constitutional discourse. In our view, this underlines the critical

flaw of methodological nationalism within constitutional and other types of analysis. A focus on the London-based, 'British' media would fail to appreciate the significant differences in the way that the laws and constitutional arrangements of the UK are socially mediated at sub-state levels.

In one sense, this article offers a proof of concept for the method and approach we propose: media analysis has something to offer to our understanding of the law and the constitution. Of course, these results may reflect the distinctively febrile Brexit setting. Further research is needed to test our results and observations. This style of analysis could be extended to a wider range of print media publications and other forms of media. The coverage of the recent cases on the prorogation of the UK Parliament, culminating with the UKSC judgment in *Miller / Cherry* [2019] UKSC 41, could provide the basis for such research, particularly given the level of media interest in those cases, their different territorial origins (from England and Scotland) and the different rulings which emerged from them. Applying the methodology and approach deployed here would allow us to gauge the extent to which the territorial patterns observed here are repeated and may shed further light on the contribution of the territorial media to constitutional discourse in the UK. As David Cameron's use of the 'ancient democracy' trope indicates, the UK's constitutional arrangements do enjoy an imagined or mythic venerable unity. However, the application of our methodology suggests that constitutional mythology is not a fully shared territorial social imaginary. It may, instead, have a distinctively Anglo-British character.

ANNEX

Print versus online media

This research focused on the *print* media. Analysing online news coverage might be thought more valuable given the vastly larger – and growing – readerships. Nevertheless, print media continues to play an important role in shaping political discourse around the constitution (Reynolds, 2019). Further, as Moran (2014a) notes, in terms of content the reports appearing in print are often the same or similar to those which appear online. While there are crucial differences in terms of formatting and visual prominence, studying printed content can provide insights into the character of online coverage as well. There also remains a striking lack of research into *either* print or online news coverage of public law cases outside of the human rights context in the UK. Investigating either can therefore help to further our understanding of the media's contribution to constitutional discourses.

Newspapers sampled

Press coverage of court decisions can vary with the political or constitutional preferences of the newspaper (Mead, 2019). Thus, where possible, in each territory papers with different editorial political positions were selected in order to balance the sample.

The *Daily Mail* is a right-leaning tabloid paper described as ‘the authentic voice of ‘middle England’’ (Henderson et al, 2016: 187). With a combined total of around 29 million print and online readers, it enjoys one of the largest readerships in the UK (Ponsford, 2019). It is avowedly Eurosceptic and campaigned for a Leave vote in 2016. The *Independent*, by contrast, is a left-leaning paper which campaigned for a Remain vote in 2016 and has since been an active proponent of a second referendum. Since March 2016, it has been published solely in a digitalised format, albeit one which retains a print style, in addition to its website, which together have an estimated readership of 22 million (Ponsford, 2019).

Both the *Herald* and *Scotsman* are broadsheet publications. The *Scotsman* has a circulation of around 16,300 while the *Herald's* is roughly 22,900 (Sharman, 2019). Both are marketed as national newspapers but their readership is confined largely to their respective cities of Edinburgh and Glasgow (Dekavalla, 2018). In the 2014 referendum, while neither took a pro-independence editorial line, several columnists did (Hutchinson, 2016: 29). Additionally, there were some differences in their editorial stances. The *Herald* (2014) issued a ‘demand’ for a federalised UK, whereas the *Scotsman* (2014) argued that Scotland would have sufficient autonomy with the fulfilment of the political pledges made during the referendum by the pro-union side. Both papers advocated a Remain vote in 2016.

Of the four territories, Wales has the least varied print media. The *Western Mail* and the *Daily Post* represent the best performing papers. Recent figures suggest that the former has a circulation of around 11,700 and the latter around 18,000 (Sharman, 2019). While the *Western Mail* styles itself as a Welsh national paper, its readership is confined largely to south Wales, whereas the *Daily Post* is read primarily in the north and is not sold in the south (Powell, 2016). Crucially, the *Daily Post* is a regional paper – an important characteristic to bear in mind when considering the results. The *Western Mail* (2016) advocated a Remain vote, while the *Daily Post* did not commit either way.

The *Belfast Telegraph* and *Irish News* are two of NI's major publications. The *Irish News* is described as 'broadly nationalist' paper (Irwin, 2016: 133) and has a circulation of around 32,300 (Sharman, 2019). The *Belfast Telegraph* has a similar circulation (approximately 34,000) but claims to have a neutral editorial stance and a cross-community readership. However, it is considered to 'lean towards unionism' (Irwin, 2016: 133). Both publications supported Remain in 2016.

Data collection

Searches were conducted using the 'powersearch' function of the online Nexis newspaper database. With the exception of *Buick*, items addressing each of the judgments were researched using the following formula: "BODY(ATLEAST1(judge OR court)) and BODY(ATLEAST1(Brexit))" for the periods specified. This provided a wide set of initial results consisting of all articles for the specified dates referring at least once to both 'judge' or 'court' and 'Brexit'. In relation to *Buick*, since the case did not turn on Brexit in the way the other cases did, a similarly broad formula was used: "BODY(ATLEAST1(judge OR court)) and BODY(ATLEAST1(minister))". The aim of using these broad terms was to cast a wide net and minimise the risk of 'false negatives', whereby 'the key-wording is too precise, thereby excluding significant amounts of relevant coverage' (Deacon, 2007: 8).

In the next stage, various exclusionary criteria were applied. These included double counts of the same articles (in which case the shorter versions were excluded), 'false positives' i.e. items which included the search terms but did not relate to the judgments of interest, items from Sunday editions (e.g. *Mail on Sunday*, which has a different editorial stance), economic / market analysis and letters. The remaining results were then compiled for analysis.

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