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EU law as an agent of national constitutional change:

Miller v Secretary of State for Exiting the European Union

Gavin Phillipson[*]

I. INTRODUCTION

It may be considered ironic that the first – and perhaps only - use of Article 50 TEU, which allows a Member State to decide to withdraw from the EU 'in accordance with its own constitutional requirements',[1] should have been by the United Kingdom, the only state in the EU without a formal Constitution, from which those 'requirements' might have been gleaned. The case of *Miller v Secretary of State for Exiting the European Union,*[2]consisted of an extended argument over just what those requirements were. This lead to a classic constitutional dispute concerning the application of principles such as separation of powers, rule of law and the hierarchical ranking of different sources of legal power within the constitution. Feeding into all of these questions was the overarching issue of the nature of EU law as it operates within – and changes – a national legal order. Paul Craig has observed that 'The decision to exit the EU ranks among the most important, if not the most important, peace time treaty decision…made by the UK'.[3] The question of how that decision

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[*] Professor of Law, Durham University, UK. Earlier versions of this paper were given at a seminar at theWalter-Hallstein Institut, Humboldt University, Berlin, a *Modern Law Review* Symposium at the LSE, a seminar at UCD Law School and in a panel at the ICON-S Annual Meeting in Copenhagen. The author is particularly grateful for the Chairs of these sessions, and for helpful comments and suggestions made by participants at ICON-S, especially those by Grianne de Burca, Jeff King, Eoin Carolan and Timothy Endicott. Many thanks also to Robert Craig, Alison Young and Tom Hickman for very helpful comments on an earlier draft of this article. The usual disclaimer applies. For ease of reference the author refers to 'the EU' and 'EU law' throughout, even when discussing the EEC or EC law and always to 'the CJEU'. All posts cited on UK Const L. Blog cited are available at available at https://ukconstitutionallaw.org/. All websites were last visited on 16 August 2017.

[1] Article 50(1) of the Treaty on European Union, inserted by the Treaty of Lisbon. See below at 000 for further provisions of Article 50.

[2] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 (hereafter '*Miller*').

[3] Paul Craig, 'Miller, Structural Constitutional Review and the Limits of Prerogative Power' (2017) *Public Law* at 000 [page cites to be inserted at proof stage].

could be lawfully made and notified therefore assumed enormous importance in what was swiftly dubbed 'the constitutional case of the century'[4] – one that attracted media coverage unprecedented in its scale and intensity.[5]

While argument in *Miller* became at times extremely intricate, the core contention of the claimants was simple: they argued that the Government *lacked legal power* under that residual source of executive power known as the royal prerogative[6] to commence withdrawal from the EU. If they were right about that, then the only way for the Government to obtain that legal power was through legislation – an Act of Parliament. This may make it sound as if *Miller* concerned a purely 'internal' British constitutional law argument, of little interest perhaps to scholars from other states.[7] But while it did concern questions of domestic constitutional law it also raised two issues of more general interest. First, a key controversy in the case as it was argued and decided in the Supreme Court concerned the nature and role of EU law in the national constitutional order – in particular whether EU law should be characterised as transforming, or as tightly controlled by, the domestic constitutional order. The second issue of interest to states that, like the UK, follow the dualist, rather than the monist tradition, is this: where a statute has given some domestic effect to rights and/or obligations flowing from an international treaty, does the Executive remain competent to exercise its ordinary power to withdraw from the treaty,

[4] A phrase used by many commentators, including UCL's respected Constitution Unit: http://www.ucl.ac.uk/constitution-unit/constitution-unit-events/brexit-in-supreme-court

[5] The BBC carried unprecedented rolling live coverage of and commentary on the hearing and judgment; there was widespread coverage across the print and online media worldwide.

[6] This may be briefly defined as the residual, non-statutory and uncodified powers of the Crown, exercised in modern times by Government Ministers on behalf of the Monarch. There is no authoritative text of the prerogative (save insofar as discrete aspects of it are identified in court judgments): its origins lie in custom and history.

[7] *Miller* also dealt with important questions concerning the role of the devolved institutions of Scotland, Wales and Northern Ireland in the decision to leave the EU. For reasons of space and the concerns of this journal those aspect of the case are not considered here; for analysis, see Jo Murkens, 'Mixed Messages in Bottles: the European Union, devolution, and the future of the constitution' (2017) 80(4) MLR 685, 690-94. The referendum held in 2016 that resulted in a vote in favour of leaving the UK leaving the EU is also not considered in this article, because it did not form an important part of the legal arguments in the case. Its broader significance is considered further by the author in G. Phillipson, 'The Brexit case: why did political constitutionalists support the Government side'? (2018) Queensland LR (forthcoming).

even where that would in some way affect domestic law? That this is not a question purely of concern to the UK may be seen from cases from South Africa concerning withdrawal from the International Criminal Court[8] and from Canada concerning the Government's withdrawal from the Kyoto climate change agreement despite the existence of a domestic implementing statute.[9]

There were two aspects of the Supreme Court's judgment that appeared novel and which have already aroused controversy. It claimed first that the effect of the domestic implementation of EU law was such as to render it an 'entirely new, independent and overriding source of domestic law'.[10] Second the Court argued that cutting off this source of EU law by terminating membership would amount to a 'far-reaching change to the UK's constitutional arrangements' and that it would be contrary to 'long-standing and fundamental principle' for such a far-reaching constitutional change to be brought about by the Executive without express legislative authorisation.[11]

Mark Elliott has accused the Supreme Court of self-contradiction by asserting that EU law is both an independent source of law but one that only has effect through an existing source – UK statute; he has also castigated the 'constitutional change' argument as unacceptably uncertain and lacking both authority and clear normative foundations.[12] This piece will seek to show that both these arguments are defensible, albeit with some 'finessing'.[13] In relation to the 'source of law' argument it will be contended that the Supreme Court was seeking to chart a path that respected the core UK tradition of parliamentary sovereignty while taking a realistic, historical view of the role and significance of EU law in the domestic order. As such its stance will be argued to be readily understandable, provided one can pick one's way past the semantic imprecision apparent in the judgment's discussion of technical jurisprudential concepts. Such imprecision is made more understandable if it is appreciated that the judgment was written in a way intended to

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[8] *Democratic Alliance v Minister of International Relations et al*, Case No: 83145/2016, High Court of South Africa, 22 February 2017.
[9] *Turp v. Canada (Minister of Justice) et al*, 2012, FC 893.
[10] *Miller,* [80]
[11] *Ibid,* [81] and [82].
[12] Mark Elliott 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (2017) 76(2)*CLJ* 257-88.
[13] Tom Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80(4) MLR 696, 703.

make it accessible to the general audience that had shown such huge interest in the case. It will then be suggested that the 'constitutional change' argument may be best understood not as a free-standing and novel principle but as a way of emphasising the sheer scale of legal change involved in leaving the EU. It is also intimately connected with the 'source of law' point. While, contrary to the views of one commentator,[14]the Supreme Court does *not* endorse the CJEU's vision of the comprehensive supremacy of EU law over national law, it does give eloquent expression to the deep transformative effect of EU law in the UK legal systems and invites us to accept the proposition that reversal of this effect by withdrawal would amount to a major constitutional change that cannot be brought about by the Executive acting alone.

In what follows, the basic legal arguments in *Miller* are first sketched out, and a brief summary of the relevant judgments given. The article then goes on to analyse the central argument advanced by the Government in the Supreme Court, drawn from academic commentary on the case: that the domestic status of EU law was always intended to be *conditional* upon Executive determination over whether the UK became and remained a member of the EU. It then moves on to explain and evaluate the two arguments advanced by the Supreme Court that, as outlined above, have aroused particular controversy. In doing so, the analysis links the 'constitutional change' argument with recent developments in UK constitutional law in which courts have begun to isolate and defend fundamental constitutional rights and principles. It will suggest that rather than being seen as an example of the 'inchoate instinctualism'[15] that Elliott condemns in the majority judgment, this principle can be seen as simply a further, modest step in this ongoing judicial project.

II. THE BASIC ISSUE IN *MILLER* AND A SUMMARY OF THE JUDGMENTS

The arguments in *Miller* rested upon a key assumption about the effect and operation of Article 50 It is therefore important to set out the key relevant parts of that provision, which are found in the first three paragraphs.

> 1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

[14] Murkens, note 7 above.

[15] Elliott, note 12 above, 288.

> (2) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State…
>
> (3) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Crucially, it was accepted for the purposes of the litigation that notice given under Article 50 cannot be unilaterally revoked: hence the giving of notice was seen as leading inevitably to the loss of at least some EU law rights.[16]

Since Article, as part of the Treaty of the European Union, applies to all 28 member states it *could* not determine the question of which arm of government within any given state can properly trigger it or under what process. The answer to that question may vary as between the different Member States of the EU. Hence the key stipulation in paragraph 1 that the withdrawal decision is to be done 'in accordance with [each state's] own constitutional requirements'.[17] Answering this question within the UK constitutional order gave rise to the dilemma that became the core issue in *Miller*, one raised by the apparent clash of two basic principles. The first is that the Executive branch has the undoubted general power under the royal prerogative to negotiate, enter into and withdraw from

[16] This is a reading of Article 50 which is strongly contested. See e.g. P. P. Craig, 'Brexit: a drama in six acts' (2006) ELR 447, 463-466. For further discussion of Article 50 see A. Tatham, '"Don't Mention
Divorce at the Wedding, Darling!" EU Accession and Withdrawal after Lisbon' in A. Biondi et al (eds) *EU Law after Lisbon* (Oxford: OUP, 2012) 128; J. Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"'? (2005) 6 GLJ 1755; H. Hofmeister, '"Should I Stay or Should I Go?"—A Critical Analysis of the Right to Withdraw From the EU' (2010) 16 ELJ 589; A. Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 EL Rev 523, 527; C. Hillion, 'Accession and Withdrawal in the Law of the European Union' in A. Arnull and D. Chalmers (eds) *Oxford Handbook of European Law* (Oxford: OUP, 2015) 139; A. Wyrozumska 'Withdrawal from the Union' in H. J. Blanke and S. Mangiameli (eds) *The European Union after Lisbon* (Springer, 2012); see also "*The Process of Withdrawing from the European Union*" (HL 138; 2015–16).

[17] The decision of the Court of Appeal in *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 419 confirmed this as the correct reading of Article 50(1) – EU law was held not to be relevant to its interpretation. The German Constitutional Court made a like finding in *Ratification of the Treaty of Lisbon, Re* [2010] 3 CMLR 13, [305-306], cited in *Shindle*r (ibid), [7].

treaties. As case law has recently confirmed, 'Ratification of a treaty is, as a matter of domestic law, an executive act within the prerogative power of the Crown',[18] a finding confirmed by numerous decisions including that of the House of Lords in *Rayner (Mincing Lane).*[19]

However, precisely because the UK is a dualist system, the ability to change the UK's obligations in international law carries with it a corollary that became the second principle in play: that the exercise of this power does not extend to altering domestic law, frustrating the purpose of any statute or removing rights enjoyed in domestic law. The key controversy in *Miller* arose from the fact that EU law has domestic effect in Member States - in the UK via the European Communities Act 1972 (hereafter 'ECA') - thus giving rise to an important set of rights enforceable in domestic law. This led to the key argument raised by the claimant Gina Miller in the case,[20] based on a general principle of constitutional law well summarised by the House of Lords in *Rayner*:

> the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.[21]

Since the ECA gives domestic effect to the various rights guaranteed to citizens of the Member States by EU law, triggering the Article 50 process will, it was argued, inevitably result in the loss of some or all of those rights and the frustration of the core purpose of the ECA. Hence, only specific legislation may authorise that process. This basic argument was

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[18] *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), at
[15]).

[19] *JH Rayner (Mincing Lane Ltd) v DTI* [1990] 2 AC 418, 500.

[20] The legal background to the litigation is explained more fully by Robert Craig: 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum' (2016) 79(6) MLR 1041

[21] n 19 above, 500.

first set out by Jeff King, Nick Barber and Tom Hickman in an extraordinarily prescient and influential blogpost.[22]

In order to understand the arguments surrounding the construction of the ECA canvassed in *Miller* it is necessary to understand the structure and effect of that statute, which has three key provisions for present purposes. First, section 2(1) provides:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law.

In essence, this provision makes available in domestic law *such of* those rights, obligations, remedies, etc as are, under EU law, 'to be given legal effect or used in' domestic law without the need for further enactment. That is, it makes 'directly effective' EU law available in UK law, in accordance with what EU law itself requires.[23] Section 2(4), discussed below, seeks to give priority to EU law over both prior and subsequent statutes. Finally, section 3(1) provides for questions as to the meaning and effect of EU law to be made in accordance with principles laid down by the CJEU or, if necessary referred to it, for determination,[24] thus rendering decisions of the CJEU binding on UK courts. Finally, the Treaties themselves are listed in section 1(1) of the Act and new Treaties have been added to section 1 by way of amendment effected by primary legislation.

A. The finding of the Divisional Court[25]

The Divisional Court saw itself as upholding two fundamental pillars of the 'unwritten' British constitution – the rule of law and parliamentary sovereignty.

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[22] 'Pulling the Article 50 "Trigger": Parliament's Indispensable Role', U.K. Const. L. Blog (27th Jun 2016). Tom Hickman was subsequently instructed as one of the Counsel for the lead claimant.

[23] Section 2(2), which is not particularly relevant to *Miller,* provides for the making of secondary legislation to implement EU law: it has been commonly used for the implementation of Directives. Such legislation will remain in effect following Brexit and thus does not raise constitutional problems re use of the prerogative to initiate exit.

[24] As described in *Miller,* at [21].

[25] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] 1 All E.R. 158.

Parliamentary sovereignty means, at its simplest, that Acts of Parliament rank higher than other sources of law within the constitution, including the residual prerogative powers of the Crown. That is why prerogative powers may be replaced by legislation[26] and why the Executive cannot use the prerogative to take away rights parliament has put into law – or render nugatory a provision of an Act of Parliament. In applying these principles, the High Court was at pains to trace the subordination of the Royal Prerogative to Parliament all the way back to the great 17th century historical struggles between King and Parliament that resulted in the English Civil War and the Glorious Revolution. That revolution was crowned by the 1689 Bill of Rights, Article 1 of which states, in words that were quoted and applied by the High Court: 'The pretended Power of Suspending of Laws by Regall Authority without Consent of Parlyament is illegall' – a key early articulation of a core rule-of-law principle. The view of the Divisional Court was clear – that the triggering of Article 50 via the prerogative would set in train a sequence of events that would result in the certain loss of at least some EU law rights and the frustration of the European Communities Act, whose effect would be 'switched off', rendering it a dead letter. As such, use of the prerogative to trigger Article 50 would be unlawful.

There were a number of arguments run by the Government in the High Court that did not re-appear on appeal, so decisively were they rejected. These included the so-called 'sequencing' argument - that Government and Parliament would act together in an appropriate sequence of events such that Parliament would amend or repeal the ECA as necessary before withdrawal came into effect. There was also the 'uncertain outcome argument': that triggering Article 50 does not *itself* remove any EU-law rights and that it is unknown at this point what rights if any will be removed[27] (with it remaining possible that none will be if the process is revoked).[28] All these arguments were roundly dismissed by the Divisional Court. The 'sequencing' argument was met with the simple but effective rejoinder

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[26] As established in the early decision of *Attorney General v De Keyser's Hotel* [1920] AC 508, 540 (HL) – a principle dubbed 'abeyance' in the influential analysis of Robert Craig, note 20 above.

[27] An argument that succeeded in parallel litigation launched in Northern Ireland, in which the court said that triggering Article 50 in itself altered nothing in domestic law and removed no-one's rights: *Re McCord, Judicial Review* [2016] NIQB 85.

[28] Paul Craig, amongst others, has argued that Article 50 *should* be read as revocable: note 16 above, 463-466.

that the Government cannot defend a course of action that would be unlawful as things stand with the plea that Parliament will later enact legislation that will cure or avoid the illegality. The Government's own concession that Article 50 was not revocable killed the 'uncertain outcome' argument, especially when coupled with an argument advanced by Dominic Chambers QC for the second claimant that there was a category of rights (known as 'category 3 rights') that would *inevitably* be lost whatever form UK withdrawal took,[29] including notably the right to stand and vote in elections to the European Parliament.[30]

By the time the matter came to the Supreme Court, the Government, comprehensively defeated in the Divisional Court, had re-tooled, formulating a set of more sophisticated arguments that drew heavily on academic commentary, in particular that published by John Finnis, a notable legal philosopher and constitutional theorist, and Mark Elliott, one of the UK's leading public lawyers.[31] It persisted with an argument that this author termed 'the argument from parliamentary omission'[32] – that as Lloyd LJ had observed in an earlier case,[33] 'when Parliament wishes to fetter the Crown's treaty-making power in relation to [EU] law, it does so in express terms.' It was pointed out that there was no explicit restriction in any EU-related legislation on use of the prerogative so as to place the withdrawal power into abeyance.

In this regard, it was seen as significant that there is a sequence of UK statutes from 1978 on in which Parliament placed various restrictions on the ability of the Executive,

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[29] The first category was those rights that would be lost but which could be converted into purely domestic law rights (e.g. certain employment law rights); the second was those that could only be replaced with the agreement of other states – e.g. free movement rights. The loss of EU-law rights is explicitly conceded by the Government's case on appeal: below note 63 at 62[a].

[30] Guaranteed under the European Parliamentary Elections Act 2002; see further below 000-000. It was the seminal blogpost by King, Barber and Hickman that first highlighted the significance of this Act: note 22 above.

[31] As Tom Poole observes: 'With the aid of extensive academic commentary, the argument on prerogative had been polished to a fine sheen in the gap between High Court and Supreme Court proceedings': note 13 above, 699.

[32] In an article written before *Miller* was first argued: Gavin Phillipson, "A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament", [2016] MLR 70(6) 1064, 1087.

[33] *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, 567.

acting through the prerogative, to agree particular amendments to the Treaties with the other Member States without specific parliamentary authorisation.[34] Thus the *absence* of any provision in any of these statutes requiring specific parliamentary authorisation for a withdrawal decision – especially those passed after the Treaty of Lisbon introduced the explicit right of exit in Article 50 - was said to lead to an inference that Parliament had not intended any restriction.[35] Finnis took this further in noting that in enacting the ECA itself and subsequent legislation, the UK Parliament 'has rigorously abstained from enacting that we are to be or are members of the European Communities or Union or parties to their Treaties'.[36] No statute stated, in terms, 'the UK shall be a member of the EU'; had it done so

[34] Thus section 6 of the European Parliamentary Elections Act 1978 provided that the Government could not ratify any treaty that increased the power of the European Parliament, *unless* that treaty had been ratified by Act of Parliament. This was reproduced in section 12 of the European Parliamentary Elections Act 2002. Subsequently, the 2008 European Union (Amendment) Act, which gave statutory recognition to the Lisbon Treaty, and thus Article 50, sets out in section 6 a list of various, specific EU-related actions that not to be taken by Ministers without specific authorisation from Parliament: it does *not* include the triggering of Article 50 as one of them. The 2011 Act set out a number of matters (essentially agreeing to extensions of the powers or competencies of the EU) that would additionally require the approval in a referendum (the so-called 'referendum locks'). Once again, none of these included triggering Article 50. Finally, the European Union Referendum Act 2015, which authorised the referendum on the UK's membership of the EU, made no provision in the event of a 'Leave' vote.

[35] An argument said to be strengthened by the fact that Parliament had been made fully cognizant of Article 50, since it had added the Treaty of Lisbon to those given effect by the ECA by European Union Amendment Act 2008 but had made no provision requiring parliamentary assent for its use. Lord Reed in dissent argued that this recognition of the right of exit must be taken to affect the relevant intention of Parliament in relation to EU law rights: *Miller* at [198]-[204]. A similar argument was previously advanced by the author: note 32 above at 1084-85; on reflection, however, the mere recognition of a Treaty right to exit by Parliament (which did not in itself become part of UK law, since not directly effective - see note 36 below) cannot affect the determination of which organ of government has a right to trigger such exit given that Article 50 makes no provision on this point.

[36] John Finnis, "Brexit and the Balance of Our Constitution" (Policy Exchange Website, 2016), available https://policyexchange.org.uk/judicial-power-project-john-finnis-on-brexit-and-the-balance-of-our-constitution/ (hereafter Finnis, 'Balance'). The reception into domestic law of Article 50 via the 2008 Act led to an argument advanced by Robert Craig that Article 50 *itself* has direct effect and so the 2008 Act adding the Lisbon Treaty to the ECA *already* amounted to a statutory power to withdraw that had placed the former prerogative into abeyance. This argument was not advanced by the Government (doubtless because it would likely have led to a reference to the CJEU) but was described as 'arguable' by Lord Reed (*Miller,* at [201]). For a detailed critique of the argument see Phillipson, note 32 above, 1069-78.

withdrawal by Executive prerogative powers would plainly have been excluded. This then essentially became an argument about the interpretation of legislative silence: was it for the Government to show express or implied parliamentary approval of a right to exit, or for the claimants to show that Parliament had plainly restricted it? In this regard the claimants' hand was strengthened by the well-established principle that 'fundamental rights cannot be overridden by general…words" in a statute.[37] The argument that statutory *silence* could be construed as allowing for their effective removal was always therefore a difficult one.

This is partly why the Government in the Supreme Court ran a new line of argument, namely *conditionality* – one taken directly from commentary written by Finnis[38] and Elliott,[39] that the ECA Act *assumes* but does not *require* UK membership and is thus a mere 'conduit' through which EU law passes, but one does not require any content to flow through it and would thus not be frustrated by the UK's withdrawal from the EU. This argument is considered in detail below.

B. The findings of the Supreme Court

Later sections of this article subject particular aspects of the Supreme Court's reasoning to detailed analysis. Here a brief summary of its key findings is given. The Court held by 8-3 that the UK Government could not use the foreign affairs prerogative to commence the process of withdrawing the UK from the EU – a process assumed to result in the UK's inevitable exit two years after Article 50 was triggered[40] - for the following reasons.

The result of the UK's exit from the EU would be to profoundly change domestic law and remove domestic law rights – those EU law rights given domestic effect by Parliament in the European Communities Act 1972, as seen above.[41] Doing this would frustrate the basic purpose of the ECA, which was to give effect to and enable the UK's membership of the

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[37] *Ex p Simms* [2000] 2 AC 115, 131.

[38] 'Brexit: on why as a matter of law-triggering Article 50 does not require parliament to legislate', available at *https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate*

[39] Finnis, 'Balance', note 36 above; see also 'Terminating Treaty-based UK Rights' (Policy Exchange, 26 October 2016) available http://judicialpowerproject.org.uk/john-finnis-terminating-treaty-based-uk-rights/

[40] Article 50(3) TFEU and *Miller*, at [34] and [36]-[37].

[41] *Miller*, at [83].

EU.[42] In particular, the Court found that membership of the EU and the effect given to it by Parliament via the ECA had given rise to a 'new source' of law in the UK, namely directly-effective EU law.[43] Hence, the Court held, while the content of EU law was not fixed by the ECA, but rather varied 'from time to time', Ministers could not, through withdrawal, bring about the cutting off of the source of law itself:[44]this would render the ECA wholly redundant. Thus *Miller* affirms the principle from the Bill of Rights 1688 and the earlier *Case of Proclamations*[45] that the prerogative may not be used to alter domestic law, frustrate the purpose of a statute, dispense with or suspend its effective operation or remove domestic law rights. While these principles are of long standing, they had not all been either affirmed or applied in modern times,[46] and certainly not by the UK's apex court.

Particularly controversial has been the Supreme Court's seeming addition to the above principles the further proposition that the prerogative may not be used to bring about 'a major change to UK constitutional arrangements'.[47] The removal of EU law as a source of domestic law, the majority said, would amount to just such a major constitutional change and the majority 'cannot accept' that this 'can be achieved by a minister alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.'[48].

Both this and the 'source' argument were said by the Supreme Court to be supported by the fact that Parliament had via the ECA given EU law a unique constitutional status:[49] instead of being displaced by subsequent inconsistent statutes, it had the effect of requiring under section 2(4) the disapplication of any *future* inconsistent enactments – as

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[42] As the Supreme Court said, 'ministers cannot frustrate the purpose of a statute or statutory provision…by emptying it of content or preventing its effectual operation': *Miller,* at [51].

[43]*Miller,* at [65], [80].

[44] *Ibid* at [79]-[81].

[45] (1610) 12 Co. Rep. 74.

[46] Though Article 1 of the Bill of Rights 1688 was applied in New Zealand, in *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

[47] *Miller* at [82].

[48] *Ibid,* at [82].

[49] *Ibid* at [81].

demonstrated in *Factortame (no 2),*[50] a status required by the core EU doctrine of the primacy of EU law over national law. This strikingly illustrated the nature and significance of the constitutional change brought about through membership and the enactment of the ECA, adding force to the argument that the Executive could not, by use of the prerogative, change the constitution again by rendering the ECA a dead letter through withdrawal.

As indicated above, it was the 'new source of law' and 'constitutional change' arguments that were apparently novel in the Supreme Court judgment – and which have proved most controversial. While this article will consider these arguments in detail, it is important to note at the outset that one could dispense completely with both of them and still maintain a successful argument for the claimants based on frustration of the ECA and removal from citizens of EU law rights. The loss of these rights was stated explicitly by the Divisional Court[51] to be sufficient ground for the claimants to win on its own. And the Supreme Court explicitly endorses this finding, saying: 'the Divisional Court was also right to say that this was another ground for justifying the conclusion in favour of the claimant.'[52]

Thus even if all the criticism directed by Mark Elliott at the source of law and constitutional change arguments were right, one could regard these as akin to firing broadsides at a decoy: for Robert Craig, for example, the real argument for the claimants is the frustration argument – which he believes stands separately.[53] While this is undoubtedly correct, this article regards the 'constitutional change' argument as of particular interest to readers of this journal in raising broader questions about the role and status of EU law in national domestic law.

There is however a key Government argument that, had it been successful, would have answered all the claimant arguments: this is the afore-mentioned contention that all the rights granted under all the legislation giving effect to the UK's membership of the EU were conditional upon membership, which had always remained revocable by the Executive. It was this argument that lay at the heart of the 3-judge dissent in *Miller,*

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[50] *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 A.C. 603, applying s. 2(4) ECA.
[51] Above, note 25 above at [63].
[52] *Miller* at [83].
[53] Robert Craig, 'A simple application of the frustration principle: prerogative, statute and Miller' [2017] *Public Law* (forthcoming) [insert page numbers at proof stage].

articulated fully in a much-praised judgment by Lord Reed, to which Lords Carnwarth and Wilson added supporting dicta. Therefore it will be considered before turning to the controversies surrounding 'source of law' and 'constitutional change'.

III. THE CONDITIONALITY ARGUMENT: EU LAW RIGHTS AS 'CONTINGENT'.

A. The basic argument

As Alison Young summarises the starting point of this argument:

> The rights and obligations brought into UK law through the 1972 Act were conditional upon the UK's continued membership of the EU. As such, Parliament enacted legislation to join the EU, but the effect of the legislation was conditional upon membership.[54]

Membership itself was brought about not by Parliament but by the Executive, using its prerogative powers to ratify the Treaty of Accession, which connected – 'plumbed in' in Young's colourful phrase[55] – the UK legal system to the EU. Thus all rights and obligations given effect by EU law were conditional upon membership, and since it is established law that the prerogative can be used to withdraw from Treaties, and Parliament had placed no overt restrictions on that power, the domestic effect of EU law must be taken to have depended from the outset upon the continued decision of the UK Government to remain a member of the EU. And just as it was the Crown that had brought about the UK's membership of the EU, the Crown could withdraw from it. This rendered all EU law rights granted *contingent* on membership. Hence the argument was made that, in Lord Reed's words:

> 'If Parliament grants rights on the basis, express or implied, that they will expire in certain circumstances, then no further legislation is needed if those circumstances occur.'[56]

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[54] Alison Young '*R. (on the application of Miller) v Secretary of State for Exiting the European Union*: Thriller or Vanilla?' (2017) EL Rev. 281 at 289.
[55] Ibid at 290.
[56] *Miller* at [219].

There was of course no 'express' statement in the ECA or any other relevant Act of Parliament that the rights would 'expire in certain circumstances'. Attempting to bolster the Government side of the argument that this was *implied*, Finnis drew an analogy with legislation giving domestic effect to extradition treaties:[57] these provisions, he argued, seriously affected the rights of UK citizens – but the effect of the legislation can be terminated purely by exercise of the prerogative. However, the comparison if anything undermined his case: section 7 of the 1862 Act, which he quotes, states in terms that "This Act shall continue in force during the continuance of the said [extradition treaty]." Those words certainly make plain that *that* particular Act could lawfully have its effect 'switched off' by the UK's withdrawal from the relevant treaty - but the example only serves to highlight the *absence* of any equivalent statement in the ECA or other EU-related legislation.[58] As a result, argument focused on the question of whether the ECA carried the 'implication' that it was granting only 'contingent' rights that the Executive could at any time render 'spent' through withdrawal.

The Government was always in some difficulty making this argument from the moment it was conceded that the triggering of Article 50 would inevitably result in the disappearance of at least some EU law rights currently enjoyed by UK citizens. Since it was well established that the prerogative could not be used so as to bring about the loss of rights enjoyed in domestic law the Government was forced to argue that the rights were, despite appearances, not really domestic law rights at all. Thus an important argument made was that, as Mark Elliott puts it:

> EU law is not domestic law in any normal or ultimate sense. Rather it forms a distinct body of law that *has effect* in domestic law, in the sense of being enforceable in national legal proceedings. As Lord Reed put it: "The 1972 Act did not create

[57] Finnis, 'Balance', note 36 above at 15-16.

[58] The 1862 Act was replaced by an Act of 1870 which provides for the domestic effect of extradition treaties made with other states to be given domestic effect by Orders in Council. However section 2 of the Act (also quoted by Finnis) states clearly that 'Every such Order… shall not remain in force for any longer period than the arrangement' with the foreign state, thus, like the 1862 Act, explicitly authorising the Executive to render the domestic legal instrument 'spent' through withdrawal from the relevant treaty.

> statutory rights in the same sense as other statutes, but gave legal effect in the UK to a body of law now known as EU law."[59]

The argument is that when those rights disappear from domestic law upon withdrawal this does not constitute loss of domestic rights because these were not rights created by Parliament, but rather rights flowing from the international plane to which Parliament had merely given domestic effect. As Elliott summarises the argument: 'The axiom that the prerogative cannot be used to change domestic law does not bite directly upon EU law if it is not, in the first place, domestic law.'[60] One might observe that in placing so very much weight on this rather fine distinction between domestic law rights and rights that are merely 'given effect' in domestic law, Lord Reed and his academic supporters are teetering next to an abyss of bottomless formalism. From the point of view of ordinary people going about their daily lives, relying on and enforcing their EU employment law rights, their rights to equal pay, their environmental law rights, this distinction would appear quite meaningless. These were, after all, rights that, just like purely UK-law based rights, were binding on the UK Government and enforceable in domestic courts. To be told that the disappearance of these rights brought about by Brexit doesn't 'count' as a 'loss of domestic law rights' because they not 'created' by a UK statute but merely 'given effect by it' is an argument that would sound quite unreal from the perspective of the rights-holder. This was especially so given that these rights actually had a unique status in UK law in that they were guaranteed – unlike any other rights – even against subsequent inconsistent legislation by Parliament.[61] Whereas ordinary statutory rights can be overridden by a later statute, and common law rights abolished or modified by legislation, these were the closest things UK citizens had to what in other countries are termed 'constitutional rights' – rights that bind even the legislature.[62]

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[59] Elliott, note 12 above at 271, citing Lord Reed at [216].
[60] Elliot, ibid.
[61] Per section 2(4) ECA; this status was of course required by the core EU law doctrine of the primacy of EU law over national law.
[62] A recent dramatic example is the decision in *R v Secretary of State for the Home Department ex p David Davis MP and ors,* [2015] EWHC 2092 (Admin), in which the High Court disapplied a provision of the 2014 Data Retention and Investigatory Powers Act and regulations made under it in reliance on the EU Charter of Fundamental Rights, as interpreted by the CJEU. On appeal the Court of Appeal referred the issue to the CJEU:

This awkward fact introduced into a Government argument already suffering from an unappealing degree of formalism a striking constitutional incongruity. The essence of its position was that statutes granting EU rights were a novel category – what the Government's appeal case dubs 'subsidiary statutes.'[63] It was hard not to see such statutes - those that *merely* give effect to EU law rights in domestic law – as having a lower status than ordinary statutes: lower, precisely because they were said to be statutes that, unlike others, may lawfully be rendered 'spent' or 'otiose' by Executive fiat. In other words, their provisions, unlike those of other statutes, are not in practice *superior* in the constitutional hierarchy to the prerogative, but rather have effect only precariously, *subject to* its exercise. This allowed the Government to argue that the rights given effect by such statutes should not be seen as statutory rights at all, but something lesser – mere contingent entitlements, removable via the prerogative.[64]

The difficulty for a court minded to accept this argument is that it is then necessary to attempt to reconcile this *inferior* status with the fact that, as already mentioned, Parliament had given the ECA an *elevated* status above those of ordinary Acts of Parliament: elevated in that it could - and did - override and displace even the provisions of *future* Acts of Parliament as the famous *Factortame* litigation demonstrated. This result of *Factortame (No 2)*[65] – the disapplication of the later Merchant Shipping Act 1988 by the earlier ECA – was such a remarkable result that it led Sir William Wade to describe the result of the case as a technical 'revolution'.[66] While this may have been an exaggeration, the rulings of the then House of Lords in *Factortame (No 1)*[67], and *Factortame (No 2)* together showed beyond doubt that the ECA, and the EU law it gives effect to, have an elevated constitutional

[2015] EWCA Civ 1185. See also *Benkharbouche & Janah v Embassy of the Republic of Sudan & Others* [2015] EWCA Civ 33 in which the Court of Appeal relied on EU law rights to set aside long-standing principles of state immunity in respect of matters taking place in Embassies (in this case the issue was their compatibility with employment law) set out in the State Immunity Act 1961. In contrast, under the Human Rights Act 1998 (which gives domestic effect to the rights in the European Convention on Human Rights) the courts could issue only a non-binding 'declaration of incompatibility' against the 1961 Act.

[63] *R (on the application of Miller) v Secretary of State for Exiting the European Union* UKSC 2016/196: Printed Case of the Appellant, at [000].

[64] *Ibid* at [49]: '…the proposition that the ECA "creates domestic law rights"….is not correct'.

[65] note 50 above.

[66] Sir William Wade, "Sovereignty – Revolution or Evolution" (1996) 112 LQR 568.

[67] [1990] 2 AC 85.

status in UK law – and one that was bestowed by Parliament itself.[68] Thus not only were the Government and its academic supporters arguing for (in effect) a second-class category of statutes but were doing so in the face of Parliament's clear intention to endow the most important of these statutes with an *elevated* status that was unprecedented. As discussed below, this was in the end a factor that led both the Divisional Court and the Supreme Court to find against this Government argument.

The above indicates the extent to which the Government's lawyers and their academic supporters were faced with something of a herculean task. Even leaving aside the constitutional incongruity just mentioned, the basic fact remained that termination of the UK's membership of the EU via the prerogative would remove all the EU rights that flowed through the conduit of the ECA into domestic law.[69] On the face of it, the abrupt disappearance of these rights would amount to a radical change to domestic law, contrary to well-established principle. Moreover the very fact that it was statute that gave effect to those rights appeared to raise a prima facie presumption that only statute – not prerogative - could authorise their removal.

Thus the only way of avoiding this conclusion was for those arguing the Government's side of the case to propose a remarkable constitutional novelty:[70] a statute that gave effect to rights in domestic law – but which was always intended by Parliament to be *contingent* on executive action on the international plane that could have the effect of terminating the rights. One might suggest that for such an intention to made out some fairly clear wording would be required. What specific arguments, then were used to support this reading?

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[68] Objections to the notion that this status can be bestowed by Parliament, rather than by the common law, are considered below at 000-000.

[69] The possibility of the rights being transferred into domestic law (via the proposed Great Repeal Bill) was disregarded given that it was agreed the court had to consider the position as it was then.

[70] Finnis's attempt to suggest that there was a clear existing analogy with Double Taxation Treaties was subject to comprehensive critique showing the contrary: see esp. K. Beal ,'The Taxing Issues Arising in Miller' U.K. Const. L. Blog (14 Nov 2016); J. King and N. Barber, 'In Defence of *Miller*', U.K. Const. L. Blog (22nd Nov 2016); E. Smith, 'Treaty Rights in *Miller and Dos Santos v. Secretary of State for Leaving the European Union*', U.K. Const. L. Blog (16th Nov 2016). The example of extradition treaties is also distinguished above at text to notes 59 and 60.

A. The textual argument: 'from time to time'

This argument was first advanced by Mark Elliott[71] and appeared prominently in the Government's case on appeal.[72] It fastens on the use of the words 'from time to time' in section 2(1) ECA, arguing that as a result, the ECA gave effect to no particular content of EU law but only whatever directly applicable EU law there is, as it varies 'from time to time'. As Elliott puts it, the result is that 'effecting Brexit will not (as had been suggested) render the ECA "a dead letter", because [that statute] serves simply to give effect to whatever EU obligations, *if any*, the UK has at any given point in time.'[73]

However this contention was vulnerable to the counter-argument, made by the majority, that there was a 'vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation' and the complete removal of the *source* of EU law that withdrawal would entail.[74] Moreover, as the majority pointed out, the phrase 'from time to time' applied only to the rights and obligations arising 'by or under the Treaties' and not to the Treaties themselves. These are listed in section 1 of the ECA and can only be added to the ECA through amending it by primary legislation,[75] a feature of the ECA which tended to suggest that Parliament intended itself to control the domestic law impact of major changes to the Treaties, as opposed to the secondary legislation flowing from the EU institutions. Finnis attempted to offer a reading of the ECA that would have collapsed this basic distinction, contending that section 2(1) 'gives domestic legal effect only to the Treaties as they are in force "from time to time", that is, only as long

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[71] Elliott, note 38 above. It was noted as a possible argument but dismissed as a mis-reading of the ECA in the original blogpost by Barber et al: note 22 above.

[72] See note 63 above at [8].

[73] Elliott, note 12 above at 262. The words 'if any' do not of course appear in the ECA.

[74] *Miller* at [78].

[75] This is with the exception of what the ECA terms 'ancillary treaties', which, per s 1 (2) and (3) ECA can be added to the Act without primary legislation, using the Order in Council procedure and requiring approval only by way of a Resolution in each House. The term 'ancillary treaties' is not defined in the ECA but it has never been used to apply to the major treaties changing and enlarging the EU. Mikolaj Barczentewicz argues that the scope of 'ancillary treaties' was regarded at the time as being much broader than this, but this is scarcely definitive, while his assertion that an ancillary treaty could have brought about the cessation of the application of EU law to the UK (in a way similar to the effect of Brexit) is made without any supporting authority at all and as such seems an unpersuasive hypothetical: 'Miller, Statutory Interpretation, and the True Place of EU Law in UK Law' (forthcoming) [2017] *Public Law* 000 at 000-000 [insert page nos at proof stage].

as they are in force.' But section 2(1) does not apply the phrase 'from time to time' to the Treaties themselves. It refers only to 'rights, powers, obligations' and the like 'from time to time *created or arising by or under* the Treaties' (emphasis added). No text in the Act states that legal effect is only to be given to the Treaties 'as long as they are in force'.[76]

Nevertheless, there is an argument to be made based purely on the generic wording of section 2(1) – and indeed Lord Reed subjects that provision to very close analysis indeed, arguing that it provides that *where there is* law that satisfies the condition of being directly effective, the ECA gives effect to it, but does not require that there be any such law.[77] It is also true that there is no explicit statement in the ECA requiring that the UK be a member of the EU – although taken in historical context, this omission is unsurprising, as discussed below (000-000).

The Government then took this argument a step further in pointing out that British Ministers make regular use of the prerogative when they negotiate and vote in the Council of Ministers on EU secondary legislation – legislation that then flows into UK law through the 'conduit' of section 2(1) ECA. It was then argued that this in itself showed that the prerogative was regularly having the effect of altering domestic law,[78] and that withdrawal would amount only to a change that was greater than this in scale.[79] But the obvious rejoinder to this argument was that this feed-through of agreement made on the international EU plane into changes to domestic law is specifically allowed for by Parliament through the terms of section 2(1). Indeed, in this way, the phrase 'from time to time' in section 2(1), so often prayed in aid by supporters of the Government case, may actually be turned back on its proponents. It can be argued that the ECA included this provision precisely in order to *allow* prerogative actions on the international plane to vary domestic law, as the content of EU law changed. In the *absence* of this permission, the standard

[76] Cf. the Human Rights Act 1998, which gives domestic effect to the rights under the European Convention on Human Rights; in that Act the Convention is defined (in s 21(1)) as the treaty 'as it has effect, for the time being, in relation to the United Kingdom'. For discussion, see A. Young and G. Phillipson, 'Would use of the prerogative to denounce the ECHR 'frustrate' the Human Rights Act? Lessons from *Miller*' (forthcoming) [2017 *Public Law* 000 [insert page numbers at proof stage].
[77] *Miller* at [184] – [191].
[78] Note 63 above, at [8].
[79] *Ibid* at [60].

constitutional rule that the Executive cannot change domestic law or remove domestic law rights applies. In other words, section 2(1) is explicit parliamentary authorisation to allow for what would ordinarily be prohibited.[80] Thus rather than section 2(1) carrying the implication that Parliament had granted the Executive *carte blanche* to do anything to EU law, including completely terminating its application to the UK by withdrawing from the treaties, it shows the opposite: Parliament had allowed for the variation *only* of rights arising 'by or under the Treaties' – it had *not* allowed for removal of the Treaties themselves.

B. The *non*-textual argument: the general assertion of conditionality

A further notable feature of the conditionality argument is that, as seen above, huge weight was placed on the particular wording of section 2(1)[81] and the fact that it permitted a varying content of EU law. This was argued to give section 2(1) a particular 'ambulatory' quality, such that it acts merely as a conduit for whatever EU law has direct effect from time to time. But what is striking about those taking the Government's side of the case is that, when confronted with a statute implementing EU law that has *none* of these qualities, such as the European Parliamentary Elections Act 2002, they simply read in contingency anyway. This suggests that the conclusion for such commentators comes first: EU law rights *must* be read as not really domestic law rights because always contingent on an Executive decision to withdraw from the EU. If there is language in a statute that supports this reading – such as 'from time to time' in section 2(1) – all well and good. But if there is none, the implication is insisted upon anyway.

The European Parliamentary Elections Act 2002 was cited by the claimant side for two reasons. First, as noted above, it was accepted that there was a category (3) of EU law rights enjoyed by UK citizens that would inevitably be lost on exit.[82] Amongst these were the constitutionally significant rights to stand and vote in elections to the European Parliament, given effect in the UK by the 2002 Act. In the High Court the Category 3 rights emerged as a

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[80] As Paul Craig puts it: 'Parliament…modified its normal dualist position, which required separate transformation or adoption of each international legal norm, by signifying in advance through section 2(1) its willingness to accommodate directly applicable and directly effective EU norms within the UK legal order': note 3 above at 000.
[81] See for example the elaborate analysis of it by Lord Reed at [184]-[191].
[82] See above, text to and note 29.

'killer argument' for the claimants, precisely because the Government side seemed to have no counter to the claim of their inevitable loss. However, the treatment by the majority in the Supreme Court of this category of rights was somewhat equivocal.[83] The second difference is that, whereas the ECA has a particular 'ambulatory' quality, giving rise only to a generic, variable set of rights, the 2002 Act looks much more like a standard Act of Parliament: it spells out specific, discrete rights in relation to elections to the European Parliament. Section 1, in stating, 'there shall be 72 members of the European Parliament (MEPs) elected for the United Kingdom', appears to manifest clear Parliamentary intention that there shall be elections for MEPs in the UK. Similarly, section 8(1) states:

> A person is entitled to vote as an elector at an election to the European Parliament in an electoral region if he is within any of subsections (2) to (5) [which set out the categories of those entitled to vote].[84]

On its face therefore the Act requires the election of MEPs 'for the UK' and gives a right to vote to those UK citizens entitled to vote in elections as well as to resident EU citizens. It

[83] At one point the majority appears to misunderstand the significance of rights being in the third category, asserting: 'If [the claimants] cannot succeed in their argument based on loss of rights in the first category, then invoking loss of rights in the other categories would not help them; and if they can succeed on the basis of loss of rights in the first category, they would not need to invoke loss of rights in the other categories' (*Miller* at [73]). While the second assertion here is clearly correct the first, with respect, seems erroneous. One key difference between the two categories is that the first category rights flowed mainly through section 2(1) of the European Communities Act[83] which, as seen above, can be argued to have a specific 'ambulatory' character in only giving effect to *such* EU law rights, obligations etc as apply 'from time to time'. Thus as a matter of pure statutory construction, one could conclude that the loss of category one rights flowing through the ECA did *not* amount to frustration *of that particular statute:* as noted above, the core of Lord Reed's dissent is built around his construction of section 2(1) as ambulatory in this sense. But, as discussed in the text, the whole point about the rights arising under the 2002 Act is that they are spelled out in the text of the Act itself. At least in principle, therefore, it would be perfectly conceivable for a court to hold that the ECA would *not* be frustrated by withdrawal, but that the 2002 Act, with its very different way of giving effect to specific category 3 rights, *would* be.

[84]This provision was highlighted in J. King and N. Barber, 'In Defence of *Miller*', U.K. Const. L. Blog (22nd Nov 2016).

thus appeared to provide an answer to the argument that, because EU law rights are not statutory rights because 'Parliament never enacted the rights in question'.[85]

The Supreme Court made no definitive finding on the 2002 Act, remarking only: 'we consider that the arguments based on the 2002 Act do nothing to undermine and may be regarded as reinforcing [our] conclusion.[86] However it is worthy of some attention[87] precisely because it is an example of conditionality being insisted upon in the absence of any engagement with the text of the Act – something that forms a strong contrast with the intense focus on the precise wording and structure of section 2(1) ECA.[88] Thus Finnis's main argument on the 2002 Act begins by asserting:

> the 2002 Act discloses no intention that there be elections in the UK to the European Parliament, but rather the intention that if and when under EU law there arises an obligation or opportunity for Member states to conduct elections to that Parliament, then such elections shall be conducted in the UK in the manner specified in the 2002 Act.[89]

Finnis cites no specific textual evidence in support of this contention from the Act, its long title or elsewhere to establish such intention. Neither does he cite any *Pepper v Hart* statement from the relevant minister. Similarly Mark Elliott,[90] whose arguments were adopted wholesale by the Government on appeal,[91] argued that, while the rights in the 2002 Act *look* different from those under the ECA, they are nevertheless still very much EU law-dependent. Again, the argument is not based on any specific textual evidence. Instead,

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[85] R. Ekins 'Constitutional practice and principle in the article 50 litigation' (2007) 133(Jul) LQR 347, 348.

[86] *Miller* at [115].

[87] For an earlier version of this argument, see G. Phillipson "The Miller Case, Part 1: A Response to Some Criticisms", U.K. Const. L. Blog (25 November 2016).

[88] Similarly Barczentewicz, in seeking to show that *Miller* was wrongly decided, proffers a close analysis of section 1 of the 1972 Act: note 75 above.

[89] J. Finnis, 'Terminating Treaty-based UK Rights: A Supplementary Note', U.K. Const. L. Blog (2nd Nov 2016). Elsewhere he went further, suggesting that the Act only provides for 'elections *at such times if any* as such an election of UK members is possible under EU law' - the words 'if any' being of course his own: note 36 above at 24.

[90] Article 50, the royal prerogative, and the European Parliamentary Elections Act 2002', 21 November 2016, available at https://publiclawforeveryone.com/2016/11/21/article-50-the-royal-prerogative-and-the-european-parliamentary-elections-act-2002/

[91] Note 63 above at [63d], which appears to quote Elliott directly.

in claiming that the 2002 Act 'does not require the UK to hold elections to the EP or otherwise guarantee that any such elections will take place', Elliott instead relies on the argument that the UK Parliament

> 'is not — and cannot be — in any position to create such an entitlement. The most [it] can do is to make arrangements for the exercise of such EU electoral rights as are provided for by EU law.[92]

First, then, it may be noted that the argument has changed from being one based on specific provisions of an Act of Parliament (such as section 2(1) ECA) to a general assertion that these rights are derived from EU law and *for that reason* cannot function as domestic law rights. This indicates that the section 2(1) argument cannot be treated as decisive, since conditionality is insisted upon even where nothing like it is present in the relevant statute. Second, there are aspects of the argument made in which a key distinction is conflated. Both Elliott and the Government's appeal case argue that Parliament cannot sensibly have intended to grant rights to stand and vote in elections to the European Parliament *in perpetuity* (or 'come what may', as Elliott puts it). Thus the Government pointed out that:

> 'If the Member States had…agreed a treaty which abolished the European Parliament, s 8 of the [2002] Act, conferring the right to vote in elections to the EP, would be otiose for lack of underpinning international law.'[93]

This, they say, demonstrates that the rights are *conditional*. As Elliott puts it, they are dependent upon the treaty obligations that call for the making of arrangements for the exercise of EU electoral right. If those disappear, 'then the Act the purpose of the Act is not thereby *frustrated.* Rather, the Act is, in effect, *spent…*'.[94]

However, there are two very different propositions being conflated here. It may well be that particular statutes can be rendered otiose because of the actions of other states. (Indeed one might add that other external events, like natural disasters, could have this effect: if a freak tidal wave wiped out Northern Ireland, it could be said to have removed a

[92] *Ibid.*
[93] *Ibid* at 25, fn 12.
[94] Elliott, note 90 above (emphasis added).

vital condition precedent (the existence of Northern Ireland) for the operation of the Northern Ireland Act 1998). But this misses a vital distinction. The frustration argument consists solely of the assertion that *the British Government* may not, through use of its prerogative, frustrate a statute by rendering it otiose. The fact that the actions of foreign states could have the same or similar effects on a UK statute is nothing to the point: the frustration principle has never applied to the actions of other states or foreign governments. Thus establishing that rights to vote in the EU Parliament are 'contingent' upon the actions of other states not abolishing that Parliament (or bringing the EU itself to an end) establishes nothing relevant.

In contrast, it *is* sensible to say that Parliament doubtless only intended these rights to be exercisable for as long as UK remained a member of the EU.[95] But that in itself tells us nothing in support of the proposition that that membership can be terminated solely via use of the prerogative. Let us recall that it is a *general principle* of UK constitutional law that use of the prerogative may not remove or frustrate the operation of rights 'enjoyed in domestic law.'[96] This is a general principle of law and so does not have to be manifested expressly in any statute to apply. Where an exercise of the prerogative would have the effect of removing or frustrating such rights, it is for those seeking to justify that outcome to point to *clear evidence* in the relevant statute that parliament intended, exceptionally, to allow the Executive to do that which would ordinarily be unlawful. The only way of doing that is to point to provisions of the Act that are said to manifest such intention. Section 7 of the 1862 Extradition Act is, as noted above, a clear example in providing, 'This Act shall continue in force during the continuance of the said [treaty].' This is clear warrant for the applicability of the Act being terminable by use of the prerogative to withdraw from the treaty. But whereas commentators do seek to find such evidence in specific provisions of the ECA,[97] as we have seen they adduce no textual evidence from the 2002 Act that Parliament intended to allow the rights to which that Act gives effect to be removable via the prerogative.

To conclude, while it is sensible to suggest that the UK Parliament intended there to be elections to the European Parliament only as long as that institution existed – and as long as the UK was a member of the EU - nothing in that intention displaces the ordinary

[95] Which is what Lord Reed asserted briefly in his dissent: at [221].
[96] *Rayner,* note 19 above, at 500.
[97] Principally s 2(1); see also note 88 above re other provisions of that Act.

principle of law that rights once given effect in domestic law may not be removed by prerogative action. The 2002 Act, in which the UK Parliament provided 'there shall be elections for MEPs for the UK' and provided for the categories of those entitled to vote in such elections, plainly gives rise to specific rights enjoyed in domestic law. As such it reinforces the argument that executive action by the UK Government that would render such elections impossible (withdrawal) *must* be authorised by the Parliament that gave effect to the rights to participate in these elections in the first place. The argument is thus *not* that the 2002 Act intended to give rise to electoral rights 'in perpetuity' but simply that Parliament, having given effect to such rights in domestic law in statute, must be the one to authorise their removal.

C. Lord Reed and lessons from history

As noted above, the core of Lord Reed's much-praised dissent lies in his reading of section 2(1) ECA as providing only that *where there is* directly effective EU law, it is given effect in UK law, but that the Act does not require that there be any. From this he concludes that the ECA is *consistent* with UK membership but does not *require* it. Lord Reed bolsters this argument by making ingenious use of one feature of the historical process by which the UK became a member of the EU. In order to consider his argument the full sequence of events needs to be briefly considered.[98] The process started when British Governments in 1961 and 1967 'sought the approval of the House of Commons to proceed with negotiations' with the six existing members of the then EEC. Subsequently in October 1971, 'Heath's Government sought the approval of the House of Commons for the UK joining…on the proposed terms' – terms 'summarised in a White Paper which had been the subject of a lengthy debate in late July 1971.' And, crucially, the Prime Minister always made clear that it was for 'Parliament…to take the decision of principle'[99] on entry; hence if Parliament had not passed the Motion approving the UK's membership in October 1971, the Government would not have proceeded further.[100]

[98] I am indebted to Simon Renton's detailed analysis, from which the following quotations are taken unless otherwise attributed: 'Historical Perspectives and the *Miller* Case', U.K. Const. L. Blog (19th Jan 2017).
[99] HC Deb, 17 June 1971 vol. 819, col. 645.
[100] HC Deb 28 October 1971 vol. 823, col. 2211.

Thus it was only once that Motion was approved that the Government proceeded to sign the Accession Treaty on 22 January 1972. It then introduced into Parliament the European Communities Bill 1972, which provided the necessary domestic-law underpinning for Britain's membership. In light of the parliamentary votes to approve joining the EU and the fact that the Government had by then signed the Treaty, that Act may be seen as having the specific purpose of enabling the UK to do what it had already agreed to do by signing the Treaty – join the EU on a lawful basis. It was enacted on 17 October 1972 and the UK instrument of ratification was deposited the very next day - on 18 October. The fact that the Government did not formally ratify the Treaty until *after* the Act was passed is explicable by the fact that the Government could not be sure that Parliament would pass the Act, given the intense controversy around the issue.[101] This is vividly illustrated by the fact that, due to major rebellions from Conservative MPs and major opposition to membership from parts of the Parliamentary Labour Party,[102] the Bill passed Second Reading in the Commons by only eight votes. In other words, the Government *had* to wait until the Act was passed: had it ratified *before* that point it would have risked joining the EU without the necessary legislative underpinning in place. This would have entailed a spectacular international fiasco: as the Divisional Court noted, the UK would have been in immediate and serious breach of EU law from day one.[103] As it was, the Act was passed, and the UK joined the EU on 1 January 1973, the date the Treaty of Accession came into force.

The point Lord Reed takes from all of this is that, when the ECA was first passed and came into force, because the UK was not yet a member of the EU, the Act, *at that time,* had no practical application. There were then, as Lord Reed puts it, 'no rights, powers and so forth, which, in accordance with the Treaties, were to be given legal effect in the UK'.[104] Hence 'The content of the category of law to which the ECA gave effect [directly effective EU law] was therefore zero.'[105] All that withdrawal means is that 'The content would return

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[101] As Renton points out. Heath made clear that, were the Bill to be defeated, his Government would resign: HC Deb 17 February 1972, vol. 831 col. 753.

[102] The later 1973 Referendum confirming Britain's decision to join was held by the Labour Wilson Government precisely because of the deep splits within the Labour party on the issue.

[103] Note 25 above at [42].

[104] *Miller* at [192]

[105] *Ibid* at [197].

to zero'. In other words, withdrawal would simply return the ECA to its original state and cannot therefore be argued to frustrate its purpose or render it a dead letter. This is a variation of a submission made by Eadie QC for the Government. In response to a question from Lord Mance as to whether his argument was that 'the European Communities Act 1972 was *neutral* as to whether the United Kingdom was a member of the European Communities', Eadie said: 'It proceeded on the fundamental *assumption* that the ultimate decision on the international plane was a matter for Government.'[106] He also observed that 'Parliament was merely *facilitating* membership' through the Act, *should* the Government, in the exercise of its treaty prerogative powers, take the United Kingdom into [then] EEC.'[107]

This is a clever argument - but quite unreal. The picture it paints is of a Parliament which passes the fiercely contentious European Communities Act *just in case* the Government should decide that Britain was going to join the EU. As the historical record above shows, in fact Parliament had been actively engaged in the decision to join, and had voted more than once to do so after lengthy and impassioned debates.[108] Government and Parliament then worked in close coordination together to ensure that the UK joined the EU with the legal mechanisms in place that membership required. Lord Reed seizes upon the happenstance that the Act was passed about 10 weeks before the UK joined; it thus sat there, like an empty conduit, ready for the taps to be turned on when the Treaty of Accession came into force on the 1st January 1973 and EU law started pouring through it into the UK legal system. But the notion that this accident of history – that ten week hiatus - helps demonstrates the notion that Parliament was *indifferent* as to whether the Act it passed ever gave effect to any EU law at all is a brilliant fantasy. The fact that the Act, when first passed, did not give effect to any EU law came about simply because the Government *had* to wait until the Act was passed to ratify the Treaty of Accession and the Treaty came into force some weeks later. To conclude from this that the ECA is best read as manifesting complete indifference to the UK's membership of the EU is wholly unreal.

[106] Transcript of hearing before the Supreme Court, Monday 5 December, p 49 (emphasis added); available https://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf
[107] *Ibid* at 99 (emphasis added).
[108] Renton, note 98 above.

As observed near the beginning of this article, the ECA contains neither any statement that 'the UK shall be a member of the EU' *nor* any words to the effect that 'this Act shall have effect only during the UK's membership of the EU', which would signal Parliament's clear acquiescence to future withdrawal by the Executive. Therefore the issue comes down to how one interprets that legislative silence. And it is here that one must examine the fundamental 'assumptions' against which Parliament legislated. Eadie QC seeks to characterise those as being that whether the UK joined was a decision for the Government, so that the Act was there only to facilitate membership, *should* the Government decide to join. But, as we have seen, this cannot be reconciled with the historical record. The UK had *already* decided to join via a vote in Parliament that the Prime Minister admitted decided the matter of principle; the Treaty of Accession already had been signed and Parliament then passed an Act that, in the words of the majority, endorsed and gave effect to' the UK's membership.[109] Thus if one is considering the assumptions on which it is realistic to suppose that Parliament legislated, the historical record makes it clear that the majority is right. The ECA was passed with the sole and specific purpose of giving effect to the UK's imminent membership of the EU: it is *not* therefore 'neutral' as to membership.

IV. EU law as an 'independent source of law'

The majority in the Supreme Court set out the various ways in which EU law has effect in the UK[110] via the European Communities Act 1972 and then remark:

> In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is…the "conduit pipe" by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and overriding source of domestic law.[111]

And later in their judgment the majority emphasises:

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[109] *Miller* at [77].

[110] Including, through the direct effect of certain Treaty Provisions via section 2(1) ECA; second through directly effective secondary EU law, principally Regulations, which also take effect through section 2(1); and third through the implementation via section 2(2) of Directives (which of course may also have direct effect in certain circumstances).

[111] *Miller* at [65].

> the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law, and the [CJEU] as a source of binding judicial decisions about its meaning. Upon the United Kingdom's withdrawal from the European Union, EU law will cease to be a source of domestic law…'[112]

Mark Elliott is heavily critical of this analysis, arguing that when the Supreme Court identified EU law as 'a direct and independent source of domestic law':

> If that proposition is to mean anything, it must surely mean that EU law is a source of law whose status as such is independent *of its acknowledgment by other sources of law*, such as UK legislation.[113]

And he then shows that this is not so, because its status *in UK law* is determined by another recognised source of law, namely statute, in the form of the European Communities Act. Hence EU law is *not* an independent source of law at all. As he puts it, 'The majority appears to end up contending that EU law is both *dependent* for its domestic status upon the ECA and an *independent* source of domestic law'; hence their judgment is in this respect mired in contradiction.[114]

A. The Rule of Recognition

There is certainly an *appearance* of inconsistency here; undoubtedly the majority agrees that the domestic effect of EU law depends on a domestic statute (the ECA); hence EU law cannot be said to be a 'independent' source in the sense of having effect *independent* of any existing statute (as does common law, for example). Moreover, understanding the majority decision here is not helped by the fact that, while declaring EU law an independent source of law, they also say clearly that the reception of EU law in the UK has not changed the Rule of Recognition in the UK.[115] However it appears likely that what the Supreme Court intended to say here is that the *supreme* rule in the UK constitution – parliamentary sovereignty - had not changed, since Parliament remains

[112] *Ibid* at [80]
[113] Note 12 above, at 272.
[114] *ibid*. The reference to the lack of a change in the rule of recognition in the reasoning of the majority can be found in *Miller* at [60].
[115] A concept famously developed by HLA Hart in his classic work of legal positivism, *The Concept of Law* (Oxford: OUP, 2nd edn, 1994).

legally competent both to alter the status of EU law in domestic law and indeed to remove its effect completely, through repeal of the ECA. Thus the majority observes that 'consistently with the principle of Parliamentary sovereignty … the 1972 Act can be repealed like any other statute' and continues:

> *For that reason*, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.[116]

The phrase 'Rule of Recognition' is sometimes used, rather loosely, to refer to what is in fact the 'supreme rule' of any system, which in the UK's case is parliament's ability to enact or repeal any law, and it seems tolerably clear that this is what the majority meant at this point. In fact, the notion of the 'Rule of Recognition', as proposed by Hart, actually refers to that *set* of rules which identify the sources of law within the UK constitution, the rules governing them and the hierarchical relationship between them. As the distinguished legal philosopher, Sir Neil McCormack has pointed out, parliamentary sovereignty is not as such 'the rule of recognition' in the UK but rather 'the supreme criterion of validity' *within* its rule of recognition.[117]

Once this is understood it becomes clear that the inception of EU law in the UK constitution *did* change the rule of recognition, in three ways.[118] First it altered it by adding EU law as a new source of law to the UK constitution. Any notion that it is only sources of law wholly independent of other sources that 'count' in the Rule of Recognition is refuted by noting that MacCormick himself listed the relevant sources of the UK constitution (prior to

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[116] *Miller* at [60].

[117] Sir Neil MacCormick, *Questioning Sovereignty*, (Oxford: OUP, 1999), at 83. I am grateful to Tom Poole whose essay highlights this important point from MacCormick: Poole, note 13 above at 703.

[118] I therefore respectfully disagree with the view of Alison Young on this point: note 54 above at 291-92. Some of Young's analysis appears to me to conflate the 'supreme rule' within the Rule of Recognition (Parliament's unchanged ability to amend or repeal any law) with the Rule of Recognition itself; however at p. 293 Young suggests that the Rule of Recognition may have changed but not the 'fundamental' (which I take to mean the 'supreme') rule of parliamentary sovereignty itself, which concurs with my own analysis and that of Robert Craig (note 53 above at 000).

1972) as follows: 'in rank order, Acts of Parliament, acts of [intra vires] delegated legislation… and precedents of the higher courts, themselves ranked hierarchically".[119] The fact that delegated legislation is listed as a separate source, despite the fact that it is not 'independent' (it derives from Acts of Parliament) disposes of the argument that EU law cannot be classified as a separate source as a matter of analytical jurisprudence. Indeed, as Robert Craig observes, Acts of the Scottish Parliament, as a source of primary legal norms, must also be added to the Rule of Recognition (thus changing it) even though they too derive their authority, ultimately, from Acts of the UK Parliament.[120] The second way in which the Rule of Recognition changed was in the priority afforded to directly effective EU law over subsequent statutes, as set out in section 2(4) and accepted by the House of Lords in the Factortame litigation.[121] While the understanding now is that section 2(4) could be overridden by express words in a later Act of Parliament, it still, at the very least, modified the doctrine of implied repeal, which is part of the Rule of Recognition. Finally a further change was made by the placing at the top of the hierarchy of judicial precedents rulings of the CJEU on questions of EU law.[122]

B. Source as origin

The above analysis has shown that it is correct, as a matter of analytical jurisprudence, to identify EU law as a new source of law, *and* as having modified the Rule of Recognition (but not the 'supreme rule'). But are the majority still open to criticism for conceptualising EU law as both an *independent* source and as *dependent* for its status on the ECA? Certainly the judgment appears to set up some tension here, as when it states:

> In one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental sense and, we consider a more realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law.[123]

[119] Note 117 above, at 88. It will be noted that the prerogative does not figure in this list of sources; this is presumably because MacCormick classifies it as part of the common law. Ecclesiastical law could also be listed separately.

[120] Namely the Scotland Act 1998 and subsequent legislation; Robert Craig at 000.

[121] McCormick was clear that the 1972 Act had brought about a change to the rule of recognition, albeit one that could be reversed if Parliament decided subsequently to repeal or modify the ECA: note 117 above at 88.

[122] Which, per s 3(1) ECA, were rendered binding on UK courts.

[123] *Miller* at [61].

It may be however that the perception of a contradiction here flows from the attempt to apply strict dualism to a system that is designed to transcend it. As Tom Poole argues,[124] the majority were seeking in their analysis to move beyond simple dualism, in an attempt to recognise the *sui generis* nature of EU law as it operates in the UK. The ECA is unique in its effects, doing something no other statute has done: it allows a foreign source of law to pour directly into UK law and take effect *as* domestic law. Moreover neither that statute, nor any other UK law or institution, has control over the content of that law. EU law is thus 'independent' in the sense that its *content* is determined not by any UK institutions but by an independent external source – the EU institutions. For example, when a new EU Regulation is passed by the EU institutions it takes immediate and full effect in UK law; not only is no action by any part of the UK legal system required for it to have that effect, but its interpretation is *also* not governed by domestic law: rulings of the CJEU are binding on UK courts and reference must be made to that Court where the meaning or requirements of EU law are unclear. Hence EU law takes effect as an 'independent' source of UK law in the very real senses that *both* its content *and* its interpretation are determined outside the UK legal system, by the EU institutions. One meaning of the word 'source' is 'origin' and it seems clear that this was the sense in which the Supreme Court was using it. To insist that the only relevant *source* of EU law is the ECA misses, as Poole observes, the distinctive, *sui generis* nature of the ECA (and, one might add, of EU law itself). It also, as he points out, conflates the notion of 'the point of *origin* of a norm' and its authorisation – 'the act or process by whose warrant or say-so the norm is binding.'[125]

But there is a broader point here. There may appear something rather myopic in the insistence that, as Elliott puts it, 'EU law is…a body of law that has whatever domestic effect is provided for by the ECA and whatever domestic status it is accorded by that legislation.' It is true in one sense – Poole's sense of 'authorisation'. But it is also important to consider the broader question of why the ECA was designed as it was. Because it is not the case that

[124] Poole, note 13 above at 701-02.

[125] Poole's point is that the majority disambiguates these two meanings of the word 'source' and that even the *authorisation* of EU law is dependent both upon the Treaties *and* the ECA: note 13 above at 702.

Parliament *happened* to choose to give effect to EU law in the way that it did. Rather two key *pre-existing* doctrines of EU law – direct effect and primacy –*themselves* shaped the design of the ECA. Thus it was the fact that *EU law* requires its own immediate effect in domestic law that led section 2(1) to be drafted in the way that it was, to ensure precisely that. And it was because EU law requires that it be given primacy over national law that section 2(4) was drafted to give directly effective EU law priority not only over previous but also *subsequent* statutes. In this sense, the insistence of the minority in *Miller* and their academic supporters that the whole thing is about a British statute risks losing sight of the bigger picture about the unique interrelationship between EU and domestic law. In contrast the majority was seeking to grapple – however imperfectly – with the unique nature and source of EU law and the fact that, in a very real sense, its status is attributable not just to the ECA but to those core requirements of the EU legal order that themselves shaped the ECA.

It should also be noticed that there is a tension – if not perhaps an outright contradiction – in the way that the minority and its supporters treat the status of EU law. On the one hand, as we have seen, in seeking to attack the reasoning of the majority, they are keen to stress that EU law *cannot* be counted as a separate source of law since it is dependent on statute for its effect. But at other times, as seen above, they are concerned to stress that, despite being given effect by a UK statute, EU law rights should not be regarded as 'statutory rights' either. Thus we saw Elliott quote Lord Reed with approval saying: 'The 1972 Act did not create statutory rights in the same sense as other statutes, but gave legal effect in the UK to a body of law now known as EU law'. Elliott therefore argues that 'EU law is not domestic law in any normal or ultimate sense. Rather it forms a distinct body of law that *has effect* in domestic law, in the sense of being enforceable in national legal proceedings.'

But this insistence that what *looks* like statutory rights are really a distinct body of EU law rights that are merely given *effect* by a domestic statute looks close to a concession that EU law rights really are a separate source of law – the very thing they deny. In this way Elliott and the minority appear to want to have it both ways: EU law *is* said to be a separate ('distinct') body of law when they want to argue that it does not give rise to domestic statutory rights. But when they want to attack the Supreme Court for saying the ECA gives

rise to a new source of law they insist that it's *not* a separate source - because it only has effect via the ECA. This is not necessarily an outright contradiction, but it does leave unclear exactly what status they regard EU law rights as having: not statutory or domestic but equally not a separate source of non-domestic law. Insisting that it is 'a distinct body of law that has effect in domestic law' but is not itself domestic law does not really advance the matter.

C. A volte face by the UK courts?

Before leaving this issue it is worth considering a very different perspective – that of Jo Murkens, who argues that in denying that EU law only has effect in the UK through a UK statute, and in characterising EU law as a 'separate and independent' source of law, the Supreme Court has 'thrown…[UK constitutional] orthodoxy out of the window.'[126] Murkens claims that this 'astonishing' feature of the judgment amounts to the Supreme Court 'aligning its case law with the ECJ's famous words in *Costa* that '…the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions'.[127] This I think is plainly going too far. While it is true that a couple of sentences of the majority judgment, particular where it characterises EU law as 'as an entirely new, independent and overriding source of domestic law',[128] could sound reminiscent of the CJEU's view,[129] there are two key ways in which the UKSC's view diverges sharply and significantly from that of the European Court.

First, Murkens is not quite right when he suggests that the majority makes the claim that 'the validity of EU law does *not* originate from the ECA.'[130] What the majority actually says is that, in one sense, 'the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status' but that it is more realistic to acknowledge the '*originating source'* of EU law as the EU institutions. Murkens summarises the judgment as saying that 'the effect of the Act is to "constitute" EU law as 'an independent and overriding source of domestic law,' remarking that 'a better term would be "to recognise"'. But this is a

[126] Murkens note 14 above, at 686, 687.
[127] Murkens, *ibid*, at 688, citing Case 6/64 *Costa* v *ENEL* [1964] ECR 585.
[128] *Miller* at [80].
[129] As Murkens points out, what the majority says could be seen as in tension with the statement in section 18 of the European Union Act 2011 that EU law is applicable and effective in the UK 'only by virtue of' the ECA.
[130] Murkens note 14 above, at 688.

little mischievous: to 'recognise' something is not at all the same as to 'constitute' it and it is tolerably clear that the Supreme Court meant the latter, given its admission that, without the ECA, 'EU law would have no domestic status'. This admission alone differentiates the UK view from that of the CJEU, for whom direct effect should be independent of any even general implementing measures, such as the ECA.[131] The majority's view that repeal of the ECA would render EU no longer effective in the UK is flatly contrary to this.

But perhaps even more significantly, having acknowledged that the ECA gives EU law a status above ordinary legislation, the Supreme Court says very clearly that:

> 'legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force'.[132]

This is wholly contrary to the CJEU's consistent view[133] that EU law takes precedence even over fundamental constitutional norms of a member statute. This section of the judgment makes plain that the force allowed for EU law within the UK system is wholly dependent upon that given to it by the UK Parliament, which remains completely free to 'infringe' EU law in this respect when it so wishes. This is a flat contradiction of the CJEU's 'crystal clear' view that 'national courts cannot disapply – let alone invalidate – [EU] law'. [134]

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[131] As appears from the same classic statement of direct effect in *Costa v ENEL*: 'the [EU] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply' (*Costa v ENEL* (Case C-6/64) [1964] ECR 585, 593): equally important is the famous statement that '*independently of the legislation of member states*, [EU] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage' (*Van Gend en Loos* (Case C-26/62) [1963] ECR 1, 12 (emphasis added)).

[132] Miller at [67].

[133] Developed from *Internationale Handeslsgesellschaft mbH v. Einfuhr- und Vorratsselle fur Getreide und Futtermittel* (Case 11/70) [1970 ECR 1125.

[134] Robert Schuetze, *European Constitutional Law* (Cambridge: CUP, 2nd ed, 2016) at 131 (summarising the '*Foto-Frost* doctrine').

Thus Murkens' argument that the irony of *Miller* lies in a belated acceptance by UK courts of the CJEU's view of the primacy of EU law – just as the UK was leaving – is unconvincing. On the contrary, the judgment of the majority may be seen as charting a skilful and nuanced path between simple notions of parliamentary sovereignty on the one-hand and the full blooded, unconditional supremacy of EU law even over national constitutions long-claimed by the CJEU.

V. THE ARGUMENT FROM CONSTITUTIONAL CHANGE

As discussed earlier, the second aspect of the Supreme Court's judgment that has caused controversy is the 'constitutional change' argument. Withdrawal from the EU, said the majority, would bring about 'a major change to UK constitutional arrangements'[135] and the majority 'cannot accept' that this 'can be achieved by a minister alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.' Indeed, said the majority, it would be contrary to 'long-standing and fundamental principle' for such a far-reaching constitutional change to be brought about by the Executive without express legislative endorsement.[136] Moreover, the majority appeared to attach considerable importance to this argument, observing that: 'the *main difficulty* with the [Government's] argument is that it does not answer the objection based on the constitutional implications of withdrawal from the EU.'[137]

Mark Elliott has strongly criticised this notion, arguing that it:

> lacks support in authority, imports into the law a novel and highly imprecise criterion by which prerogative power is delimited and rests upon normative constitutional foundations that are unarticulated and arguably absent.[138]

Elliott's criticism has some limited force. Given that the majority described this principle as 'long-standing' it is unfortunate that they saw fit to cite no authority for it[139] – although this

[135] *Miller* at [82].
[136] Ibid at [81] and [82].
[137] *ibid* at [81] (emphasis added).
[138] Elliott, note 12 above at 258.

may be because they did not see it as establishing a new principle at all. More importantly, perhaps, it remains unclear whether these dicta are intended to introduce a new and *free-standing* restriction on the use of prerogative power or whether they serve rather to drive home the basic frustration argument – strengthening it by pointing out the sheer scale of the change to domestic law that would be brought about by withdrawal. It may be that that the majority were simply making the point that, given use of the prerogative may not change domestic law, it can be taken as *a fortiori* that it cannot alter the domestic *legal order* – the constitution itself. Used this way the principle could simply be one that operated as a way of resolving any ambiguities thrown up by the operation of the frustration principle: if there were doubt as to whether it applied, the fact that the exercise of the prerogative in question could fairly be said to amount to a change of constitutional importance would be a factor counting against use of the prerogative. If the Supreme Court intended only the latter, then Elliott's criticism loses much of its force. First, no new authority would be needed for such a proposition; second, its alleged novelty and lack of precision would not matter if it were never intended to function as a free-standing, *additional* restriction on use of the prerogative, but rather as a supplement to, or refinement of, the well-established frustration principle. Certainly the majority may fairly be criticised for leaving *that* issue unclear, but that is a rather different matter. In what follows, I will first consider whether the 'constitutional change' argument *can* function as a free-standing one. I will then seek to shed light on the notion by using a comparative constitutional perspective, suggesting that it is worthy of – at the least – serious academic consideration. I will aim to start that debate – and in doing so, seek to supply the omission of the majority by suggesting an underpinning justification for such a principle.

An initial point should be clarified at the outset. It is well known that the UK constitution consists not only of legal rules but also of constitutional conventions: these are non-legal norms, not enforced by the courts,[140] several of which are of great importance.

[139] As Elliott rather acidly observes, 'given that the majority asserted the principle "followed from the ordinary application of basic concepts of constitutional law to the present issue", it is unfortunate that [they] did not see fit to identify those concepts' (*ibid* at 264).
[140] The Supreme Court quoted the classic statement by the Supreme Court of Canada in *Re Resolution to Amend the Constitution* [1981] 1 SCR 753, at 853, per Estey and MacIntyre JJ: 'A fundamental difference between the legal…rules of the constitution, and the conventional rules is that, while a breach of the legal rules…has a legal consequence in that

For example, the rule that the Queen must appoint as Prime Minister, and thus head of the government, the person best able to command the confidence of the House of Commons is an absolutely core rule of the UK constitution – and it is a convention only. One could thus object to the proposition in *Miller* that the Executive may not bring about major 'constitutional change' by noting that such change can be brought about through changing a constitutional convention – and the Executive branch (either Ministers or the Queen herself) *can* bring about such a change, through the way they exercise their prerogative powers.[141] This then would be an example of the Executive branch having changed a (non-legal) norm of the constitution. Plainly it would be contrary to the nature of conventions themselves were courts to cite such a change as grounds to castigate use of the prerogative as unlawful. As *Miller* itself confirmed in relation to the Sewel Convention, concerning respect for the sphere of competence of the devolved administrations in Scotland, Wales and Northern Ireland, the courts can take cognisance of, but may not directly enforce, constitutional conventions.[142] Hence it is sensible to read the 'constitutional change' principle in *Miller* as being confined to changes to *legal* rules of the constitution, which are after all the normal concern of the courts.

A. A free-standing or a parasitic principle?

It is immediately apparent that this limiting condition strongly qualifies any notion that the 'constitutional change' principle could operate as a separate, free-standing ground of challenge. For, as noted above, it is *already* settled law that use of the prerogative may not change domestic law (whether statute or common law). Therefore if use of the

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it will be restrained by the courts, no such sanction exists for breach or non-observance of the conventional rules. The observance of constitutional conventions depends upon the acceptance of the obligation of conformance by the actors deemed to be bound thereby' (quoted in *Miller* at [142]).

[141] A historical example is the gradual emergence of a convention during the early 20th Century that it is the Prime Minister alone (not the Cabinet) who can request a dissolution of Parliament. This emerged in the context of the exercise of the (former) prerogative of dissolution. There is no formal method of changing a constitutional convention, since such a rule simply consists of an agreed-upon way of doing things, backed by precedent and the belief amongst those who work the constitution that it is the right way to do things. They therefore can change simply through a change in constitutional behaviour being adopted, which subsequently gains acceptance by other relevant political actors.

[142] *Miller* at [146].

prerogative modified a legal rule with constitutional content it would *already* have fallen foul of this long-standing rule, and the fact that it had made a change of constitutional significance could *only* function as an additional reason for finding against it. In other cases, where the change made to domestic law was small in scale, or in some other way not clearly established, the 'constitutional change' argument might help resolve ambiguity as to whether the legal change was *de minimis* or not. This might apply where either use of the prerogative would affect the operation of a minor provision of an Act of Parliament, but not be clearly *contrary* to it;[143] it might also apply if such use appeared contrary to, or in tension with a common law rule, but the scope – and perhaps even existence – of that rule was unclear. In such circumstances, the argument could operate as guidance: it would be a factor weighing in the balance against use of the prerogative if doing so would bring about a change of constitutional significance. It would thus function as a guiding light to the court where the application of the ordinary principles governing use of the prerogative yielded no clear-cut result.

It is important also to emphasise that this is how the argument *must* have functioned in *Miller* itself. In *Miller* the use of the constitutional change argument was wholly dependent upon – indeed flowed from – the court's *prior* finding that a statute of major constitutional importance (the ECA) would be rendered a dead letter by use of the prerogative to trigger Article 50. In other words, the major constitutional change that the majority was referring to *in Miller* was nothing more or less than the frustration of a particularly important statute – and the consequent loss of the substantial set of rights to which that statute gave effect. Thus the argument *could not* have operated in a free-standing way in *Miller* itself, because the constitutional change in question *consisted of* rendering a constitutional statute nugatory. It also would also of course have brought about a major change in domestic law – again, a separate and long-established limitation upon use of the prerogative. Thus it seems fairly clear that when Elliott suggests that the principle may be characterised as meaning that

[143] Withdrawal from the ECHR, for example, would not be contrary to any express provision in the Human Rights Act but would leave some minor provisions with nothing further to do: one example is section 14, which provides a procedure for approving derogations from the Convention at the domestic level. Several other examples are discussed by the author in a forthcoming article with Alison Young: note 76 above.

> use of the prerogative…is now constrained not only by established principles [but] also by its incapacity to do things that have a degree of constitutional significance beyond a given threshold[144]

he is positing an implausible reading given the facts of *Miller* itself.

It follows therefore that even if *Miller could* be read as suggesting that the constitutional change principle could apply independently of the frustration of any statute, that suggestion would be, strictly speaking, *obiter dicta*, since that was not the position in *Miller* itself. Indeed it appears likely that *most* cases will involve circumstances in which it is claimed that use of the prerogative would affect either statute or common law. After all, if (as affirmed above) we are talking about change to a *legal* rule of the constitution (not a conventional one) then in nearly all cases the claimant would *necessarily* have already identified a change to either statute or common law; hence there would be no question of applying the constitutional change principle in a free-standing way. It would probably only be in rare cases that circumstances arose in which it could be claimed with any plausibility that use of the prerogative would bring about a legal change of constitutional significance but somehow not change either statute or common law.

Two possible examples come to mind. The first is where the Executive proposed withdrawing from a treaty and judicial reference to that treaty had become a significant factor either in developing the common law or statutory interpretation[145] in an area of constitutional importance. In such a case it would be possible to argue against use of the prerogative to procure withdrawal on the ground that a change to the constitution would

[144] Elliott acknowledges that it is not clear what the principle means, but concludes that it is implausible to regard it as applying *only* to changes of the scale of EU withdrawal: note 12 above at 264-66.

[145] There is a general principle of statutory interpretation that the UK is assumed not to intend to legislate so as to undermine its obligations in international law (see, e.g. *R (Brind) v Secretary of State for the Home Department* [1991] 1 A.C. 696. A recent example is *Assange v Swedish Prosecution Authority* [2012] 2 AC 471 where at [122] Lord Dyson said: "there is no doubt that there is a 'strong presumption' in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations'. Similarly, ambiguities in the common law can be resolved in a way that upholds such obligations: *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

come about through loss of the ability of the courts to use the Treaty as an interpretive aid in domestic-law adjudication.[146]

A second example arises from the possibility of a future UK withdrawal from the European Convention on Human Rights, which is given domestic effect via the Human Rights Act. In a forthcoming article with Alison Young[147]the author discusses whether, were the Human Rights Act still to be in force, withdrawal from the Convention could be seen as 'frustrating' that Act, and/or causing the loss of domestic rights under it. But there is also the quite separate issue that, leaving aside the Act, withdrawal would also bring about two changes that could be argued to be of constitutional significance in the UK: the loss of the right of individuals to petition the Strasbourg Court under Article 34 ECHR and the ending of the UK's current obligation under Article 46 to comply with adverse judgments of that Court. The orthodox response to any challenge to withdrawal on these grounds would be to argue that both the right of UK citizens to individual petition and the UK's Article 46 obligation were created purely by prerogative action on the international plane and so can be removed by it. Given that neither of these things are creatures of domestic law (and are certainly not the creation of any statute) it would not be possible to argue that their loss changed domestic law or frustrated any statute; any argument that the right of UK citizens[148] to petition the Strasbourg was a *de facto* domestic law right would also probably fail. Hence the only argument that could be brought to challenge these aspects of withdrawal would be that these two changes were of sufficient constitutional significance as to require explicit authorisation by Parliament. At that point, a court would have to consider whether the 'constitutional change' principle articulated in *Miller c*ould be deployed as a ground of challenge *in itself* to use of the prerogative to withdraw from the ECHR. Standing in the way of such acceptance would, of course, be the standard view that decisions taken

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[146] And see the remarkable judgment of Lord Kerr in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [235]-[262], in which his Lordship decides that Article 3(1) of the UN Convention 'is directly enforceable in UK domestic law' despite the absence of incorporating legislation. Withdrawal from that Convention could then be said to cause a change in domestic law.
[147] See note 76 above.
[148] The right of course also applies to all those in the jurisdiction of the UK.

under the foreign affairs prerogative are non-justiciable;[149] the response would have to be that the challenge was *not* to the international dimension of the action taken but to its effect upon the UK constitutional order: in particular to the loss of the individual right of those within the jurisdiction of the UK to petition the Strasbourg Court. Whether such an argument would or could succeed is beyond the scope of this article: the point for present purposes is that it would be only in rare circumstances like these that the constitutional change argument could be used in a truly free-standing way. In *Miller* – whatever possibilities it generates for the future – it was not.

Finally, to return to Elliott's 'uncertainty' criticism, it must be conceded that this aspect of the reasoning of the Supreme Court has introduced some uncertainty into the law. However some uncertainly is nearly always generated by constitutional innovation. The notion of 'constitutional statutes' itself introduced considerable uncertainty, not least because the definition proposed by Laws LJ is extremely vague;[150] and yet Elliott who, as we saw above, was so critical of the uncertainty of the 'constitutional scale' argument in *Miller,* has been enthusiastic not just about this innovation but about the suggestion in *HS2*[151] that there may be hierarchy *within* constitutional statutes.[152] Whatever the merits of such a suggestion, it certainly adds further uncertainty to an already uncertain doctrine.

B. A possible normative foundation

The above analysis has explained why the constitutional change argument was not applied in a free-standing way in *Miller* and could only rarely, if ever, be so applied. That in itself

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[149] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417, per Lord Roskill; see recently dicta of Lord Kerr, note 146 above at [237].

[150] *Thoburn v Sunderland City Council* [2002] 1 CMLR 50, in which Laws LJ defined a constitutional statute as 'one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.' Category (a) is notoriously vague.

[151] *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, at [207].

[152] The suggestion was that both the European Communities Act and Article 9 of the Bill of Rights are 'constitutional' in status, but that the latter might well rank higher, and thus not be capable of being displaced by the 1972 Act. Elliott described *HS2* as proposing 'a far richer constitutional order in which the differential normative claims of constitutional and other measures fall to be recognised and calibrated in legal terms.' http://ukconstitutionallaw.org/2014/01/23/mark-elliot-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/

goes some way to answering Elliott's criticism of the uncertainly of a criterion that relies on prohibiting something that is far along enough on a 'scale' of constitutional importance. [153]It is notable however that Elliott makes no attempt to consider the cogency of the *opposite* contention to the one he criticises: that it is perfectly appropriate and unproblematic for the prerogative to be used to bring about major constitutional change. In asserting so forcibly that the 'normative foundation' for a prohibition on use of the prerogative to make such changes 'is, at best, obscure',[154] Elliott at least gives the *impression* that he would regard such use of the prerogative as unproblematic. But before endorsing such a notion it would be worth doing two things that Elliott does not: first considering why joining / withdrawing from the EU might be regarded as a change of constitutional importance; second asking ourselves whether there is any reason to regard use of executive powers to change the constitution with suspicion.

Let us recall then what happened when the UK joined the EU - this remarkable international organisation, which demands both that its laws take direct effect in the states' domestic laws (contrary to the core domestic precept of dualism) and that they are superior in normative force to domestic law (contrary to the UK doctrine of parliamentary sovereignty). The argument made here is that, in order to bring this about, the UK Parliament crafted a statute that gave effect to *both* of these revolutionary demands – and *in doing so clearly changed the constitution.*[155]

Perhaps strangely, this basic but important point has gone rather unrecognised – which is perhaps why the Supreme Court felt the need to point it out. Since the UK has no codified constitution it is not always readily apparent when it is being amended, simply because it is changed the way ordinary law is changed – through Acts of Parliament, through

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[153] It should be noticed that the notion of a 'scale' is Elliott's – it is not a term that appears in the judgment.
[154] Elliott, note 12 above, at 268.
[155] Ekins in a recent note critiquing *Miller,* suggests that the UK Government would itself have fallen foul of any such 'constitutional change' principle by using the prerogative to join the EU, which was 'an act of immense constitutional significance': Ekins, note 85 above at 351. But this is misconceived: joining was of such significance precisely because of the 'revolutionary demands' that entry made upon UK law; but those demands were only given effect via statute - the ECA. Thus the passage of the ECA itself *complied* with the *Miller* principle that major (legal) changes to the constitution may only be brought about by statute.

changes to common law and in myriad other ways. But the key point is that the 1972 Act, on any sensible view, amounted in effect to a constitutional amendment – and a very important one. And since withdrawal from the EU logically therefore also entails *re-amending* the constitution, what Elliott appears to be arguing is that the Government *may* use the prerogative to make major changes to the UK constitution.

The argument can be illustrated from the experience of other European states – states with codified Constitutions. Many of these countries, either on joining the EU, or at least after the Treaty of Maastricht established the European Union, had to amend their constitutions as a result; examples include Ireland, Austria, Spain, Hungary, France and Germany.[156] While some countries, like the Netherlands[157] did not, this was because their constitutions were monist, containing explicit provision allowing for treaty law to take effect in domestic law *and* to override inconsistent domestic law[158] – hence already satisfying these basic twin conditions of EU membership.

The argument then is that it was the same for the UK: the constitution had to change to accommodate membership; but absent a formal process of constitutional change that came about simply by statute - the ECA. But that provided for what was still a dramatic change in a monist British constitution still governed by Diceyan orthodoxy, in which Parliament cannot bind its successors so that the later statute always prevails over any inconsistent provisions in an earlier one. As discussed earlier, section 2(4) of the ECA provided that future statutes would not impliedly repeal inconsistent provisions of EU law or the ECA that gave them effect; instead they would take effect 'subject to' the requirements of directly effective EU law. How significant this was only became apparent when the famous *Factortame* litigation arose, and the UK courts 'disapplied' a statute

[156] The relevant amendments are as follows: Constitution of Ireland: Third Amendment; Austrian Constitution: multiple amendments made upon accession to the EU in 1995; Spanish Constitution: amendment to Article 13(2) (consequent upon Maastricht); Hungary: multiple amendments made to allow for membership (17 December, 2002); French Constitution: Amendment of 1992 (consequent upon the Maastricht Treaty); German Constitution, Article 23 (added by amendment).
[157] Denmark, like the Netherlands, found a 'home' for the role of EU law in an existing provision of the Constitution, namely Article 20; the same applied initially in relation to the Italian Constitution (Article 11) but, following a constitutional amendment in 2001 a new Article 117 was added to the Constitution to expressly deal with EU membership.
[158] Article 92 of the Constitution for the Kingdom of the Netherlands; see also Article 91(3).

passed 16 years after the ECA – the Merchant Shipping Act 1988, because of its incompatibility with EU law. And when *that* happened it was immediately recognised as a moment of profound constitutional change. In fact the attempt to grapple with how it was that a court had been able to disapply a statute for the first time in order to allow for the primacy of EU law spawned an entirely fresh jurisprudential creation – the 'constitutional statute'.[159] And this in turn overturned more than a century of allegiance to Dicey's flat normative landscape in which the Dentist Act 1887 and Bill of Rights 1688 have exactly the same status.[160]

Thus the effect of the ECA – the conduit that carries EU law into the UK – was profound indeed. Not only did a vast flood of EU law in the form of thousands of pages of Regulations, and of foundational principles in the Treaties like non-discrimination flow into the UK legal system, in such quantity and significance that it is widely acknowledged that unpicking it will take government lawyers many years of work. But at the same time the constitution itself was radically changed: the traditional doctrine of parliamentary sovereignty – its very bedrock – was, as we have just seen, significantly modified; dualism was overcome, hierarchies of statutes were established for the first time, and British courts become bound when applying EU law by the rulings of an international court.[161] Thus when the CJEU decided that a centuries-old rule forbidding the granting of injunctions against Ministers of the Crown must be discarded, in order to ensure the practical as well as the normative supremacy of EU law as against domestic law[162], the UK courts obediently accepted and applied the ruling.[163]

This amounts, on any standard, to major constitutional change. Hence reversing it – by withdrawing the UK from the EU – would too. And that brings us to the next point -

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[159] Postulated in *Thoburn* and accepted in dicta of the Supreme Court in *H v Lord Advocate* [2012] UKSC 24, at [32], per Lord Hope, and *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, esp at [207].

[160] I borrow this vivid phrase from Elliott, who describes Dicey as envisaging 'a constitutional landscape of unrelenting normative flatness', in which the Act of Union and the Dentists Act 1878 were both of equal status: note 152 above.

[161] By s. 3(1) ECA 1972, summarised above at 000.

[162] Case C-213/89 R v Secretary of State for Transport ex p Factortame Ltd [1990] ECR I-2433.

[163] *Factortame (no 2),* note 50 above.

which is that of course in virtually all democratic states, amending the constitution require a special procedure, typically extraordinary majorities in (both houses of) the legislature (as in Germany)[164] or a binding referendum (as in Ireland).[165] And this brings us to the heart of the point the majority may have been seeking to highlight in Miller. Consider for a moment some basic principles deriving from the separation of powers in the light of Lord Diplock's well-known observation, '… it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers.'[166] If there is a conceptual distinction between the roles of the executive and the legislature it must surely be that the former takes action *within* the existing legal framework while the latter *changes* that framework. While it is common for the Executive to exercise *delegated* legislative powers, when doing so it is acting within an authority granted by the legislature for a specific purpose and thus ultimately controlled by the legislature. Absent such authorisation the Executive may not change domestic law.[167] This is the basis of the separation of powers – reflected in the core principle governing the Executive prerogative powers, that 'since the 17th century the prerogative has not empowered the Crown to change English common law or statute law.'[168]

This begins to give us a sense of what the majority may have had in mind. As we have seen, it follows from the Separation of Powers that the Executive cannot even make ordinary legislation. That power – of changing the general law – is reserved to, and is the special competence of, the legislature. But in nearly all countries the constitution sits at a higher level still: it cannot be changed through ordinary legislation; instead a special process

[164] Basic Law of the Federal Republic of Germany, Article 79.
[165] The Constitution of Ireland, Articles 46 and 47
[166] Duport Steel v Sirs [1980] 1 All ER 529, 540.
[167] There are strictly limited exceptions: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 deals with a colonial prerogative power to legislate for overseas territories. Another exception may relate to the former prerogative to manage the Civil Service; but see discussion of this in Phillipson, note 87 above. Another is where use of the prerogative changes the facts to which the law relates. In *Miller,* the majority mention *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 in which exercise of the prerogative to extend UK territorial waters 'resulted in the criminalisation of broadcasts from ships in the extended area, which had previously been lawful': *Miller* at [53].
[168] *Ibid* at [44].

of constitutional amendment is required.[169] We can thus sketch a basic three-level constitutional hierarchy: at the first level, Executive action (which may involve delegated or subordinate law-making);[170] at the second, primary legislative change; at the third, constitutional amendment. Using this analysis enables one to see how startling the claim of the minority in the Supreme Court and their academic supporters is: that the government may use the executive prerogative powers to do something that is *two levels* above its normal area of competence – operate at the third level and make a major change to the constitution. And this despite the fact that it is long-established constitutional doctrine that it may *not* use the prerogative at only the second level to change ordinary law. That, It is suggested, is the proposition that the Supreme Court said we can be confident in rejecting.[171]

C. An objection: the UK constitution is different.

An obvious objection to the analysis above is that it disregards the special nature of the UK constitution.[172] Yes, in other countries, change to the constitution requires a special procedure, precisely because their constitutions sit above ordinary legislation in the legal hierarchy. But in the UK the constitution consists merely of ordinary legislation, common law principles, conventions and the like: it has no special status and there is no special procedure for amending it. It is of course correct to say that the UK has no codified constitution with special status as its European counterparts do. However the proposition that constitutional laws in the UK have *no* special status and may be changed *exactly like*

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[169] Some parts of a Constitution may be un-amendable by any means: well known examples are those in the German Constitution upholding human dignity (Article 1) and the federal, democratic nature of the State (Article 20) both of which are excluded from the amendment procedure under Article 79(3).

[170] Including the making of bye-laws by local authorities.

[171] One might also ask why it is permissible for the courts but not the Executive branch to change the constitution, as they undoubtedly do (a question raised by Jeff King during discussion of an early version of this paper at ICON-S, Copenhagen, 2017). The legitimacy and extent of the courts' role in introducing constitutional innovation is of course fiercely contested, but the simplest answer is that long-standing principle forbids the Executive from making using of the prerogative to change domestic law and this article argues that the 'constitutional change' argument is simply a refinement of this principle; in contrast, no such prohibition has ever applied to the courts, whose creative role, especially when developing the common law, is widely accepted.

[172] Aileen Kavanagh raised this point during discussion at ICON-S.

any other is dated and no longer accurate: it ignores the process by which the courts have steadily introduced important distinctions according special status both to certain fundamental rights and to certain statutes that embody such rights, or important constitutional principles. A few examples from the case-law will illustrate the point.

The operation of the first kind of constraint may be seen in the Supreme Court's decision in *Ahmed v HM Treasury.*[173] The Court found that the Government could not use Orders in Council (a form of delegated legislation) made under the United Nations Act 1946 to implement a UN Security Council Resolution by introducing draconian asset-freezing powers to be used against terrorist suspects. This was in spite of the very broad wording of the enabling power in s 1(1) of the United Nations Act 1946, which authorised the enactment of Orders in Council 'when this is 'necessary or expedient' for the purpose of giving effect to UN Security Council Resolutions– precisely what the Government was doing. However, the court found that it was for the 'very reason' that the statutory words were so general that they should be read as being 'susceptible to the presumption, in the absence of express words or necessary implication to the contrary, that they were intended to be subject to the basic rights of the individual'[174] (in this case the right of access to the courts to challenge the freezing orders, which the Justices described as having a 'devastating' effect on those subject to them).[175] In words very reminiscent of *Miller,* Lord Hope commented that this 'a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament',[176] while Lord Rodgers agreed that only Parliament could authorise such grave interferences with individual rights: 'the democratically elected Parliament, rather than the executive, should make the final decision'.[177]

Ahmed did not involve use of the prerogative but it is similar to *Miller* in this respect: both cases involved the courts construing limits on Executive power when its threatened exercised would otherwise have intruded on fundamental rights (common law rights of property and access to a court in *Ahmed;* EU law rights in Miller*).* In *Ahmed* this was brought

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[173] [2010] UK SC 2.
[174] *Ibid* at [249], per Lord Mance.
[175] *Ibid* at [60], per Lord Hope.
[176] *Ibid* at [61].
[177] *Ibid* at [186].

about through construction of a broad enabling power in legislation; in *Miller* through interpretation of common law rules governing the interplay between statute and prerogative power but both the end result and the principle applied were the same:[178] Executive power may not be used to remove or undermine constitutionally significant rights. The key point is that in *Ahmed* it was the constitutional significance of the rights at stake that drove the courts' interpretation of the enabling statute. Words that would otherwise have been found easily broad enough to authorise the rules made by Ministers were read down so as to preclude them. Given that it was the significance that the common law constitution afforded to the rights in play that produced the result, it turned out that the uncodified UK constitution – in this case in the form of common law rights – could *not* be changed by the use of Executive powers. This has become part of a broader 'principle of legality' whereby, in the words of Lord Hoffmann, 'fundamental rights cannot be overridden by general or ambiguous [statutory] words.'[179]

Thus *Ahmed* was only an example of a broader constitutional doctrine more explicitly invoked in *Miller:* that there are certain constitutional rights and statutes that require the special protection of the courts. Whereas in other jurisdictions this may amount to a power of constitutional review of legislation with strike-down powers,[180] in the UK this has thus far only amounted to a power to insist that any restrictions on rights or constitutional principles deemed fundamental be expressly authorised by legislation. Where such express words are absent, the courts have been prepared to deploy sometimes very strong interpretive powers to 'read down' general legislative provisions.

Ahmed thus serves as a good example of the courts protecting constitutionally significant *rights* from Executive incursion. *Evans*[181] provides an even more dramatic example but this time of the protection of a basic constitutional *principle* – the rule of law. In that case, the Supreme Court read down a provision in freedom of information legislation

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[178] And as the House of Lords observed in the seminal decision of *GHCQ,* the fact that the power exercised derives from prerogative instead of statute should not alter the citizen's right to challenge it: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417.

[179] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 13 1.

[180] Although not necessarily: no such power exists in the constitutions of Denmark or Sweden.

[181] *R (Evans) v Attorney General* [2015] UKSC 21.

allowing Ministers to issue a veto that could override the decision of a tribunal ordering the release to the applicant of the information sought.[182] Whereas the provision in question[183] appeared to give a broad discretion to the Minister to decide to withhold the information subject only to a requirement of reasonable grounds,[184] a majority in the Supreme Court found there to be a constitutional principle in play: the rule of law principle that the Executive must abide by, and may not set aside, the decision of an independent judicial body. This they said was a principle so fundamental that it was displaceable only by the clearest words in a statute, which they found not to be present. Accordingly the power was read down extremely restrictively so that the Minister could only veto the Tribunal's decision where there had been 'a material change of circumstances' or it was demonstrably flawed in fact or in law', but for a technical reason could not be appealed.[185] *Evans* is a controversial decision[186] but for present purposes it is cited only as demonstrating clear precedent for the proposition that the scope of Executive power will be read down to prevent it from changing important constitutional principles. From this to the proposition in *Miller* that the particular Executive power vesting in the prerogative may not be used so as

[182] The case concerned a prolonged dispute as to whether memos written by Prince Charles to various government departments giving his views on various aspects of public policy should be released under the Freedom of Information Act 2000 or not. Government departments all refused to release the documents, a decision upheld by the FOI Commissioner. However, the Commissioner's decision was challenged in, and overturned by the Upper Tribunal (a tribunal of equivalent status to the High Court) which ordered the release of the memos. Instead of appealing the Tribunal's decision, the Government issued a veto under section 53 of the Freedom of the Information Act 2000. That veto was then successfully challenged by way of judicial review in a case that went up to the Supreme Court

[183] Section 53 of the 2000 Act provided that a Minister could issue the veto simply by giving the Information Commissioner 'a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure [to comply with the Act].'

[184] Traditionally interpreted by courts as allowing for challenge by way of judicial role only when *Wednesbury* unreasonable – that is as falling wholly outside the range of responses open to a reasonable decision-maker.

[185] *Evans,* note 181 above, at [71]. Within the majority, the judgment of Lord Mance and Baroness Hale proposed a more moderate 'reading-down' of the veto.

[186] For critical discussion, see M. Elliott, 'A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture [2015] PL 539, 541; CJS Knight, 'The rule of law, parliamentary sovereignty and the ministerial veto' (2015) 131(Oct) LQR 547, 548; R. Craig 'Black Spiders Weaving Webs: The Constitutional Implications of Executive Veto of Tribunal Determinations' [2016] 79(1) MLR 166-182.

to make major changes to the constitution is a very short step indeed – indeed it may be seen simply as a rearticulation of the *same* principle, rather than any change to it.

The above discussion has referred to the notion of 'constitutional statutes' – those considered by the courts to be of sufficient importance in their protection of fundamental rights or constitutional principles so as to require Parliament to repeal them expressly, if that is what it wishes to do,[187] rather than allowing such statutes to be subject to the ordinary process of implied repeal whereby a later statute automatically 'repeals' an earlier one to the extent of any inconsistency. The first statute to be identified as having this importance was of course the European Communities Act itself and both the Divisional Court and the Supreme Court judgments in *Miller* referred to this. The Divisional Court made the strong point that given Parliament had given the ECA an elevated constitutional status above those of ordinary Acts of Parliament such that it could override – and displace – even the provisions of *future* Acts of Parliament,[188] it was most unlikely that Parliament had intended that the prerogative – a source of legal authority that ranks below Acts of Parliament – could be used to render the ECA a dead letter. As the court put it:

> Since in enacting the ECA as a statute of major constitutional importance, Parliament has indicated it should be exempt from casual, implied repeal by Parliament itself, *still less* can it be thought to be likely that Parliament nonetheless intended that its legal effects could be removed by the Crown through the use of its prerogative powers'.[189]

This may be seen as the precursor of the Supreme Court's 'constitutional change' argument: indeed by identifying the ECA as a statute of 'major constitutional importance' and asserting that the prerogative could not be used to remove its legal effects, the lower court was making a very similar claim. The Supreme Court made similar observations about the significance of the ECA, noting that:

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[187] See note 159 above.

[188] Under section 2(4) ECA, applied in *Factortame Ltd v Secretary of State (No 2)* so as to set aside provisions in the later Merchant Shipping Act 1988 that were found to be incompatible with directly effective EU law given effect through the 1972 Act. See above at 000.

[189] Note 25 above at [88]

> it authorises a dynamic process by which, without further primary legislation (and, in some cases, even without any domestic legislation), EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. [Thus]…in constitutional terms the effect of the 1972 Act was unprecedented.[190]

The Supreme Court did not say in terms that the ECA was 'a constitutional statute'; indeed it might be thought that its more cautious description of it as having 'a constitutional character' was meant to express demurral at the notion of constitutional statutes generally. However given that the court immediately goes on to say that the Act has a constitutional character 'as discussed' in various authorities and then gives the citation for the classic discussion of 'constitutional statutes in those previous cases[191] this seems unlikely. Indeed it seems tolerably clear that the Supreme Court draws the same conclusion from the ECA's special status as did the Divisional Court: it is found to reinforce the conclusion that Ministers acting alone cannot cut off the source of EU law from the UK because:

> 'the source in question was brought into existence by Parliament through primary legislation [the ECA], which gave that source an overriding supremacy in the hierarchy of domestic law sources.'

This aspect of the judgment has been subject to important criticism: that it is wrong to claim that *Parliament* can give an Act 'constitutional status' that sets aside the doctrine of implied repeal. This is said to be erroneous because contrary to certain well-known *obiter dicta* of Laws LJ in *Thoburn v Sunderland City Council*[192] that *only the common law* may bestow such status. As Elliott and Hooper put it:

> In *Thoburn*, Laws LJ was at pains to emphasise that whether something is a constitutional statute is *not* a matter of parliamentary intention. Rather, it is a

[190] *Miller* at [60]
[191] Laws LJ in *Thoburn* note 150 above, at [58]-[59], and Lord Reed, Neuberger and Mance in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324, at [78] to [79] and [206] to 207.
[192] [2002] 1 CMLR 50.

> conclusion reached, and a status ascribed to legislation by, the *common law*. 'The ECA is, by force of the common law, a constitutional statute.' Thus it is not for Parliament to intend that a statute be regarded as constitutional; it is for judges applying the principles of the common law to decide for themselves.[193]

Similarly David Feldman wrote that the Divisional Court:

> mis-states the process by which a statute comes to be regarded as 'constitutional'. As Laws L.J. made clear in *Thoburn*, a statutory provision is constitutional not because the legislature intended it to have that status (which in any case had not been recognized in law when the 1972 Act was passing through Parliament) but because the common law confers that status on it. In other words, constitutional status is the result of what Parliament enacts, not an aspect of Parliament's 'intention' in enacting it.[194]

This criticism too was echoed in the Government's printed case of appeal to the Supreme Court:

> 'the constitutional status of a statue is conferred by the common law (Thoburn at [69]) and not, as the [Divisional Court] suggested as a result of the intention of the legislature…'.[195]

Thus critics of the Divisional Court judgment – and by implication of the similar assertions made by the majority in the Supreme Court - appear to assert that in identifying *Parliament* as having endowed the ECA with special constitutional status, the courts have erred: *only* the common law can do this. It is true that Laws LJ, in certain dicta in *Thoburn* - the case that

[193] Mark Elliott and Hayley Hooper, 'Critical reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union' U.K. Const. L. Blog (7th Nov. 2016).

[194] D. Feldman, 'Brexit, the Royal Prerogative, and Parliamentary Sovereignty' UK Const. L. Blog (8th Nov 2016).

[195] See note 63 above, Appendix, [2].

originated the 'constitutional statute doctrine' - asserted that this was something only the courts could do, not Parliament itself. At one point in the judgment he said that Parliament:

> cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal…The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty.[196]

Thus critics who complain that aspects of *Miller* are incompatible with these dicta in *Thoburn* are right. The problem with their critique however, is that these dicta of Laws LJ are clearly wrong on this point (and have always been wrong). By 'this point' I mean *not* the judge's assertion that the common law can bestow certain statutes with constitutional status but rather his assertion that *only* the courts can do this, while Parliament cannot. And recall that this is the *only* relevant point for present purposes: the critics are complaining that the courts in *Miller* wrongly asserted that *Parliament itself* had endowed the ECA with constitutional status. The criticism only remains valid if Laws LJ was right about this. But there are several convincing reasons to believe he was wrong.

First, his positive argument for the assertion rests on a false premise. He claims that Parliament can 'no more stipulate against implied repeal [than]…it can stipulate against express repeal', because, 'being sovereign, [Parliament] cannot abandon its sovereignty.' However the suggestion that *the same reasons* for holding Parliament unable to prevent express repeal of a statute also render it unable to prevent implied repeal does not withstand analysis. Were Parliament able to choose any statute it wanted and render it un-repealable by any means this would be an obvious and serious affront to democracy: any policy could be thus entrenched, frustrating attempts by a new government elected on a different manifesto to change it. In contrast, mere stipulation against implied repeal amounts only to a requirement of linguistic *form* —that is, a requirement that a future statute must use express words in order to undo a previous statute; and this amounts to no substantive restriction upon the freedom of action of a future Parliament. It is a moment's work for a draftsman to insert such words into a statute. As Goldsworthy, in one of the most sophisticated defences of parliamentary sovereignty written, puts it, 'a Parliament that can only effectively legislate if it uses a particular form of words, to ensure that its intentions are

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[196] *Thoburn*, note 192 above at [59].

unmistakeable, is still free to legislate whenever it wishes to do so'.[197] Thus there are excellent democratic reasons for denying to Parliament the ability to set any one of its statutes in stone in perpetuity that simply do not apply to a mere requirement that a particular statute be subject only to express repeal. And in fact Laws LJ himself appears to accept in *Thoburn* that the suspension of implied repeal in relation to a given statute, or set of statutes 'preserves the sovereignty of the legislature' – which makes a nonsense of his suggestion that were Parliament to stipulate against implied repeal it would be 'abandon[ing] its sovereignty'.

Second, the suggestion that Parliament *'cannot'* protect one of its statutes from implied repeal, but that the courts can, is hard to take seriously. Given that implied repeal is a judge-made doctrine, it would give that doctrine an unheard-of status in common law as a rule that Parliament is uniquely legally unable to change. There is quite simply no authority[198] and it appears to run wholly counter to the basics of Parliamentary sovereignty by elevating a common law rule (implied repeal) above statute when it is elementary that statute ranks higher than common law in the UK constitution. If the UK Parliament is sovereign, it appears a simple contradiction to argue that the courts, subordinate to Parliament precisely under that doctrine, *can* introduce a restriction of form, while Parliament itself cannot. While one could perhaps make the argument that no statute can be protected against implied repeal *by any means*, it is quite incoherent to argue that the courts can grant such protection but Parliament cannot.

Thus the positive argument that Laws LJ makes for this proposition appears plainly contrary to basic principle. But more practically speaking it appears impossible to square with both the plain words of section 2(4) of the European Communities Act and the effect given to them by a unanimous House of Lords in *Factortame*. Section 2(4), by saying that any Act 'to be passed', that is, any *future* Act, must take effect 'subject to' the provisions of the 1972 Act, seemed to suggest that the courts must allow Community law – given effect in UK law by the 1972 Act- to prevail over subsequent Acts of Parliament. This was evidently an attempt to suspend the normal doctrine of implied repeal; instead of any later statute

197 J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, (Oxford: OUP, 1999), at 245.

198 *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, 597 certainly contains an (obiter) denial that Parliament can suspend the implied repeal of a particular statute, but not in the context of simultaneous assertions that the courts *can* do this.

which conflicted with EU law impliedly repealing it, such a later statute would have to be either 'construed', that is, interpreted so that it did not conflict with EU law, or if it could not be so interpreted, not be given effect ('have effect subject to'). That this attempt was successful was shown by the unanimous finding of the House of Lords in *Factortame Ltd v Secretary of State (No 2)*,[199] that the later Merchant Shipping Act 1988 Act did *no*t impliedly repeal the earlier ECA 1972, but rather was 'set aside' by virtue of the superior force of the ECA. And that superior force came directly from Parliament's enacted intention, as expressed in s 2(4) of that Act. As Lord Bridge explained in *Factortame (no 1),* that provision:

> has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable [EU law] rights of nationals of any Member State of the [EU].[200]

Thus the UK's then top court found unanimously in two decisions that it was *Parliament* that had given EU law and the statute that gave it effect, the ECA, this special status, such that implied repeal was suspended. It is therefore somewhat remarkable that the *obiter dicta* assertion by a single judge in the High Court that Parliament *cannot* do such a thing was ever given credence. Whatever the common law can do, it is clear that Parliament *can* change the rule of implied repeal – and did so in the ECA. To the extent that obiter dicta in *Thoburn* suggest the contrary, they have always been simply mistaken. Hence they form no basis on which to ground criticism of *Miller.*

To summarise a long argument, the objection that it is perfectly permissible for the Executive to change the UK constitution simply because the UK constitution, unlike most others, has no formal process of constitutional change, has been found to be both simplistic and misleading. The UK in fact has well-developed constitutional doctrine designed to limit the ability of the Executive to override basic constitutional rights and principles – and *Miller* can be seen as simply another case in which this principle was applied. As Timothy Endicott – a strong critic of the decision in *Miller* - has put it:

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199 [1991] 1 AC 603
200 [1990] 2 AC 85.

'In Britain, Parliament can change the constitution, and the courts can determine the law of the constitution, but it is the Government that must uphold the constitution.'[201]

D. Conclusion on the 'constitutional change' argument

The above discussion sought to make two main arguments. First, the proposition that the Executive alone may not make major changes to the constitution should not be treated as a startling one when viewed in comparative perspective. The response that such an argument does not apply to the UK system was answered via consideration of existing doctrine whereby the courts have protected fundamental constitutional rights and principles from incursions by the Executive. It was also pointed out, however that *Miller* itself did not amount to a free-standing use of the 'constitutional change' argument. It may be that academic debate on this subject results in a consensus that the constitutional change principle is best confined to situations like *Miller* itself: where it is part and parcel of an established ground of challenge – frustration of a statute and/or loss of statutory rights. But it would seem premature at this point to rule out the free-standing approach in all possible circumstances: further discussion is needed.

VI. CONCLUSION

The decision in favour of the claimants in *Miller* is seen by its supporters as resting in part on elementary principles of constitutional law that have not been doubted since the 17th century. As explained above, apparent novelties or difficulties in the decision – treating EU law as new source of law, and denying the ability of the Executive unilaterally to make major changes to the UK constitution – are neither novel nor unsupported by principle, when placed in proper context. Undoubtedly part of the importance of *Miller* lay in the arguments that were rejected. The Supreme Court might have accepted as a general

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[201] Timothy Endicott, 'Parliament and the Prerogative: From the Case of Proclamations to Miller', Policy Exchange, 1 December 2016, available https://judicialpowerproject.org.uk/timothy-endicott-parliament-and-the-prerogative-from-the-case-of-proclamations-to-miller/

proposition that the prerogative may take away even people's 'fundamental rights',[202] or that statutes giving effect to rights derived from international law can for that reason be assumed to be merely 'subsidiary' and liable to be rendered 'spent' through prerogative action. Had it done so, it could have caused real damage to the steady progress our public law has made over many years in bringing the prerogative – which I have described as 'one of the central problems of the UK constitution'[203] - under parliamentary and judicial control. But, as the Introduction to this article suggested, *Miller* also paid eloquent tribute to the deep transformative effect that EU law has had in the UK constitution. There may indeed be an irony in the fact that such tribute was paid only as the UK is set to leave the EU.[204] However, it is hoped that the principles laid down in *Miller* will continue to provide inspiration not only to Member States grappling with the role of EU law in their legal orders, but also to those dualist states seeking to articulate limitations to the use of Executive treaty powers where domestic law is affected. In that way – as in many others - the effects of the UK's membership of the EU may live on.

[202] As proposed by David Feldman, note 194, whose arguments were partly adopted by the Government: note 63 above at [56].
[203] Phillipson, note 32 above at 1064.
[204] Murkens, n 14 above at 696 who compares this to 'Hegel's famous remark about the owl of Minerva spreading her wings only with the falling of the dusk': *ibid.*