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## The Legacy of Brexit in the Courts: Ship-Money, Formalism, and the Value of Choice?

Samuel Ley\*

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### ABSTRACT

*This note critically examines the UK Supreme Court's judgment in R (Miller) v Secretary of State for Exiting the European Union. The majority decision upheld the finding of the Divisional Court that the Government's foreign affairs prerogative did not provide a legal basis for giving notice under Article 50 TEU to EU institutions of the UK's intention to withdraw from the EU. The Divisional Court was held out by many as 'the enemies of the people' for seeking to frustrate the will of the people as expressed in the National Referendum of 23 June 2016. The majority in the Supreme Court has similarly been heavily criticised by academics and the minority for pursuing an 'exercise in pure legal formalism'. By drawing on case law from 1637 and pioneering theoretical work on the fair attribution of responsibility, this note provides a comprehensive defence of the Supreme Court's decision in Miller to finally displace the critique of legal formalism.*

### INTRODUCTION

On 23 June 2016, a UK-wide referendum was held under the European Union Referendum Act 2015. It produced an overall majority in favour of leaving the EU. With this vote, a process of vast social, legal, economic, and political change was initiated. Against this background, the Government sought to notify the EU institutions of its intention to withdraw the UK from the Union. Article 50 of the Treaty on European Union ("TEU"), provides that 'Any member state may decide to withdraw from the Union in accordance with its own constitutional requirements.' It was the meaning of those 'constitutional requirements', and

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whether the Government could lawfully trigger Article 50 without the consent of Parliament, as it so claimed, which concerned the Supreme Court ('UKSC') in *Miller*.<sup>1</sup> The Court handed its decision down on 24 January 2017. Enough time has now passed, and enough dust has settled, to take stock of the decision's merits.

This article seeks to make a belated, yet unique, contribution to what has turned into a rather sour public debate on the merits of the *Miller* decision. It argues that, contrary to many voices suggesting otherwise, the judgment was not excessively 'formalistic' and the critique of 'formalism' falls short in all its different guises. In *Miller*, the UKSC emphasised its role as an autonomous constitutional player. Left to pick up the pieces of a fractured political relationship, the UKSC sought to compensate for perceived or actual weaknesses of the executive and the legislature, thereby promoting circumstances best conducive to the exercise of their rational constitutional agency. To these ends, the reasoning of the majority in the UKSC will be defended.

In making these submissions, this article will first set out the decision in *Miller* before directing the reader's gaze back in time to a case decided by the Court of Exchequer in 1637.<sup>2</sup> In doing so, this article will draw on certain strands of theoretical reasoning: one well-trodden in the public law discourse, the other hitherto under-explored.<sup>3</sup> Under such guidance, one is able to better understand the constitutional implications of *Miller* and how the latter ought to govern future legal changes.

## I. MILLER

In the Divisional Court<sup>4</sup> the debate was framed as a matter of two questions: first, could the Government trigger Article 50 in the exercise of its foreign affairs prerogative and second, was there any statutory basis for the executive to trigger Article 50 TEU? In answering the first question, the Divisional Court held that

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<sup>1</sup> R (*Miller*) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583 (SC).

<sup>2</sup> R v John Hampden (*The Case of Ship-Money*) (1637) 3 Howell State Trials 825.

<sup>3</sup> On the latter, see eg Emmanuel Voyiakis, *Private Law and the Value of Choice* (Hart Publishing 2017).

<sup>4</sup> R (*Miller and Dos Santos*) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) in the Divisional Court before Lord Thomas CJ, Sir Terence Etherton MR, and Sales LJ.

whilst the making and unmaking of international treaties is normally a matter for the Crown, ‘the Crown cannot, in ordinary circumstances, alter domestic law (...) it cannot [without Parliament], confer rights on individuals or deprive individuals of rights.’<sup>5</sup> For the Divisional Court, the ‘powerful constitutional principle’ that the Crown has no power to alter the law of the land should take precedence over its treaty-making power as it was ‘the product of an especially strong constitutional tradition in the UK.’<sup>6</sup>

In relation to the second question, relying on the status of the European Communities Act 1972 (‘ECA’) as a ‘constitutional statute’ which could not be impliedly repealed by the enactment of later inconsistent legislation,<sup>7</sup> the Court reasoned that since Parliament had designated the ECA 1972 to be ‘a statute of major constitutional importance’ and had thereby indicated that it should be exempt from implied repeal by Parliament itself, it could not have intended that the Crown remove those rights through the use of its prerogative powers.<sup>8</sup> The Court also further bolstered its interpretation of Parliamentary intention by reference to a textual analysis of the relevant statutory provisions.<sup>9</sup>

In the Supreme Court, this reasoning was largely affirmed by an 8-3 majority decision.<sup>10</sup> As earlier, the Court framed the debate as a tension between the two familiar constitutional principles. The first is that ‘ministers generally enjoy a power freely to enter into and to terminate treaties’. The second feature is that ministers are not normally entitled to exercise any power if it results in a change in UK domestic law, unless a statute, ie an Act of Parliament, so provides.<sup>11</sup>

In terms of which power should take precedence, the Court decided for Parliament by refusing to add a new exception to the rule that the prerogative cannot change the law, beyond the two very limited categories already

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<sup>5</sup> *ibid* [32].

<sup>6</sup> *ibid* [86].

<sup>7</sup> *cf* *Thoburn v Sunderland City Council* [2003] QB 151 [60]–[64].

<sup>8</sup> *R (Miller and Dos Santos) (n 4)* [88].

<sup>9</sup> *ibid* [93]–[94].

<sup>10</sup> *Miller (n 1)* [101] and [115] (Lord Neuberger, Baroness Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

<sup>11</sup> *Miller (n 1)* [5].

recognised.<sup>12</sup> To come to this conclusion, the Supreme Court reached further than the Divisional Court. In what has been called ‘a significant restatement of basic elements of UK constitutional law’,<sup>13</sup> the majority held that the ECA 1972 did not simply *give effect* to the EU Treaties, but instead introduced into UK law ‘an entirely new, independent and overriding source of domestic law’.<sup>14</sup> The Court considered that whilst ‘in one sense (...) it can be said that the 1972 Act is the source of EU law (...) 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’.<sup>15</sup> The conclusion inevitably followed that the prerogative could not be used to repeal EU law, just like it could not be used to repeal any other Act of Parliament. This, the Court held, amounted to a ‘fundamental legal change’<sup>16</sup> which must be effected in ‘the only way that the UK constitution recognises, namely by Parliamentary legislation.’<sup>17</sup>

On the issue of whether statute had changed this, the UKSC upheld the Divisional Court’s finding that the Government could not remove constitutional statutory rights<sup>18</sup> by invoking the principle of legality in *ex parte Simms*<sup>19</sup> to interpret the ECA 1972 as a constitutional statute.

In the minority, Lord Reed took the view that the ECA ‘imposes no requirement and manifests no intention, in respect of the UK’s membership of the EU’.<sup>20</sup> Rather, it is only a ‘scheme under which the *effect* given to EU law in domestic law reflects the UK’s international obligations under the Treaties, whatever they may be.’<sup>21</sup> In line with the characterisation of EU law supported by

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<sup>12</sup> Namely, where it is inherent in the prerogative power that its exercise will affect the legal rights and duties of others and where the effect of an exercise of prerogative powers is to change the facts to which the law applies.

<sup>13</sup> Thomas Poole, ‘Devotion to Legalism: On the Brexit Case’ (2017) 80 MLR 685, 697, 699.

<sup>14</sup> *Miller* (n 1) [80] (Lord Neuberger, Baroness Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge).

<sup>15</sup> *ibid* [61].

<sup>16</sup> *ibid* [83].

<sup>17</sup> *ibid* [82].

<sup>18</sup> *ibid* [83].

<sup>19</sup> *ibid* [83], [108].

<sup>20</sup> *ibid* [177] Lord Reed.

<sup>21</sup> *ibid* [187] (emphasis added).

critics Feldman<sup>22</sup> and Elliott,<sup>23</sup> the 1972 Act could therefore be seen as a channel running between two legal systems, allowing EU law and rights to be drawn on in Member States' systems, subject to various constitutional fillers which may differ between Member States.<sup>24</sup> In short, this represents a strictly dualist position where the Government's prerogative power to make and unmake international treaties remained intact.

Furthermore, the minority advanced a normative justification for their conclusions. Lord Hughes and Lord Carnwath both emphasised, to differing degrees, the essentially political nature of the case which dictated minimal judicial intervention<sup>25</sup> and the case's false binary nature being presented as a choice between Parliamentary sovereignty and the 'untrammelled' exercise of the prerogative by the Executive. For the minority, 'no less fundamental to our constitution is the principle of Parliamentary accountability. The Executive is accountable to Parliament for its exercise of the prerogative, including its actions in international law'.<sup>26</sup>

## II. HAMPDEN'S CASE

Rewinding the clock to the 1600s, a case decided during the radically different constitutional scene preceding the Glorious Revolution provides an unexpected guide to understanding the Miller judgment. Ship-money was a tax in England levied intermittently during the seventeenth century, typically on the inhabitants of coastal areas for reasons of national defence or purposes such as transport. Counties were required to provide ships or, money *in lieu* of ships as means to those ends. Following the Petition of Right in 1628, ship-money was one of rare taxes that the Crown could levy by its own prerogative powers without Parliamentary approval. From 1634 onwards, King Charles I sought to levy ship-money during peacetime on the inland counties of England. John Hampden, a

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<sup>22</sup> David Feldman, 'Pulling a Trigger or Starting a Journey? Brexit in the Supreme Court' (2017) 76 CLJ 217.

<sup>23</sup> Mark Elliott, 'The Supreme Court's judgment in Miller: In Search of Constitutional Principle' (2017) 76 CLJ 257.

<sup>24</sup> Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, OUP 2015) ch 5.

<sup>25</sup> *Miller* (n 1) [273] (Lord Carnwath), [240] (Lord Reed).

<sup>26</sup> *ibid* [249] (Lord Carnwath).

wealthy Buckinghamshire landowner, refused payment of a ship-money writ issued in August 1635 on the basis of its interference with his property rights. A fully constituted panel of twelve judges in the Court of Exchequer Chamber, as it then was, found against Hampden by a 7-5 majority.<sup>27</sup>

Before delving into the reasons for the majority's decision, it is of interest to note certain superficial similarities between *Hampden* and *Miller*. In *Miller*, the UKSC rightly, in the view of this author, stressed the 'unique' nature of the case.<sup>28</sup> The uniqueness of the decision is demonstrated in three ways, all three of which coincide with certain features of the *Hampden* case.

First, both cases concerned a conflict of the Crown's power and interference with individual rights, occurring in circumstances of uncertain and sweeping constitutional change. The cases had ostensibly limited impact and resulted in heavy criticism against the judiciary. In 1637, as noted above, the English constitutional set-up was in transition. By August 1641, the so-called Long Parliament of England had declared, both by resolution and the Ship Money Act 1640, that the levy of ship-money, the opinions of the judges in *Hampden* approving its legality, and the judgment against Mr Hampden were illegal. This retrospective enactment implied that the large majority of the judges had taken an erroneous view in *Hampden* – one that most historians of the seventeenth century have stringently criticised them for.<sup>29</sup> Indeed, such was the condemnation of the *Hampden* decision that seven judges were impeached or threatened with impeachment either on account of their judgments or for their shares in the extra-judicial opinions preceding the case.<sup>30</sup>

Similarly, in addition to taking place at a time of great constitutional change and setting up a collision of Crown power and individual rights, *Miller* was unique in its own contradiction: it garnered intense public interest and elicited from sections of the population a shameful reaction to the Divisional Court judgment. Yet, *prima facie*, its political impact was also 'distinctly muted'.<sup>31</sup> By the time the case came before the UKSC, the Court was well aware that both the Government

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<sup>27</sup> *Hampden* (n 2).

<sup>28</sup> *Miller* (n 1) [90].

<sup>29</sup> David L Keir, 'The Case of Ship-money' (1936) 52 LQR 546.

<sup>30</sup> *ibid* 557.

<sup>31</sup> Richard Clayton, 'The Brexit Case That Never Was' (*UK Con Law Blog*, 22 March 2017) <<https://ukconstitutionallaw.org/2017/03/22/richard-clayton-qc-the-brexite-case-that-never-was/>> accessed 27 January 2018.

and Parliament had agreed to implement the referendum result through whatever means their respective constitutional positions allowed.<sup>32</sup> Moreover, perhaps to the dismay of many, the *Miller* decision did not ‘stop Brexit’. *Miller* was, it seemed, ‘the Brexit case that never was’.<sup>33</sup> In both cases, therefore, the Court took what in hindsight became an unpopular position concerning when Parliamentary consent ought to be obtained in the exercise of the prerogative. Their decision was later addressed by Parliament, with the judiciary branded enemies of the people.<sup>34</sup>

Second, in both *Hampden* and *Miller*, the decisions were reached on relatively narrow points of law divorced from the factual complexities and matrices of their time. The writ demanding ship-money in *Hampden* famously asserted that the realm was exposed to the danger of ravaging pirates and threatened by disorders in neighbouring countries.<sup>35</sup> This assertion seemed to be generally accepted with little protest on either side so that, by the time the case reached the Court of Exchequer, only a point of law could be decided and no real dispute arose on whether any national emergency did in fact exist.<sup>36</sup>

Similarly, from the outset in the *Miller* case, the Government had faced an uphill challenge due to its own poor characterisation of the case.<sup>37</sup> Through the Government’s acceptance that notification given under Article 50 TEU was ‘irrevocable’, the claimants were able to liken an Article 50 notification to ‘firing a bullet’,<sup>38</sup> which would inevitably lead to the UK ceasing to be a Member State of the EU.<sup>39</sup> Thus, there was an automatic ‘danger’ to the existence of UK domestic law because EU law was part of domestic law and would cease to have effect. Whilst acceptance thereof on behalf of the Government perhaps reflected a deeper political need to avoid appearing to resist Brexit,<sup>40</sup> to the Supreme Court

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<sup>32</sup> *Miller* (n 1) [32]-[33].

<sup>33</sup> Clayton (n 31).

<sup>34</sup> Though after *Miller*, of course, Parliament did not partake in this judicial defenestration.

<sup>35</sup> *Hampden* (n 2) 1006 (Sir Francis Weston).

<sup>36</sup> *ibid*, although it is questionable whether the Court could actually have decided such a question, even if it had addressed it.

<sup>37</sup> In conversation with Professor Thomas Poole, LSE.

<sup>38</sup> *Miller* (n 1) [36].

<sup>39</sup> Endorsed by the majority in *Miller* (n 1) [94].

<sup>40</sup> Feldman (n 22) 219.



it may have seemed somewhat unsatisfactory that the outcome of the case should turn on such a technicality.<sup>41</sup>

The final ‘unique’ feature of both cases is more subtle, yet still noteworthy. In the UKSC, the majority describe the EU Treaties as ‘unique in their legislative and constitutional implications [because] a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law’.<sup>42</sup> Commentators have picked up on the distinct constitutional shifts of this claim as it represents a judicial choice that in certain ways ‘re-describes’ the ‘Parliamentary sovereignty paradigm’.<sup>43</sup>

How was the UKSC able to perpetuate this change? In large part, the Justices were unconstrained by authority. Whilst counsel had taken the Court on an interesting journey through four centuries of legal sources from different parts of the common law world, direct precedents remained ‘hard to find’.<sup>44</sup> Furthermore, *Hampden* was ‘something of a novelty’ to the Court of Exchequer. Though ship-money had frequently been levied on seaports and coastal places, and even on inland towns, it generally had not been required from inland counties.<sup>45</sup> Throughout the judgement, therefore, few authorities are cited on the direct point that the King ought not to impose ship-money beyond the coastal regions.

This last point serves only to indicate that the uniqueness of the *Miller* and *Hampden* cases lay not only in their political ‘circumstantial location’ per se, but can likewise be found in their judicial treatment. These conditions formed part of the background against which *Miller* should be evaluated.

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<sup>41</sup> Indeed Lord Kerr expressed his views on the matter, ‘Brexit Is Reversible Even after Date Is Set, Says Author of Article 50’ *The Guardian* (London, 10 November 2017) <<https://www.theguardian.com/politics/2017/nov/10/brexit-date-is-not-irreversible-says-man-who-wrote-article-50-lord-kerr>> accessed 27 January 2018.

<sup>42</sup> *Miller* (n 1) [90].

<sup>43</sup> Poole (n 13) 704.

<sup>44</sup> *Miller* (n 1) [246]-[247] (Lord Carnwath) and [54] (the majority): ‘There is little case law on the power to terminate or withdraw from treaties’.

<sup>45</sup> Keir (n 29) 555.

### III. LESSONS LEARNED

Of course, as noted earlier, the constitutional scene prior to 1688 was very different from its contemporary counterpart. It therefore seems unlikely that, despite superficial similarities, *Hampden* can be directly applied to the *Miller* judgment. However, lessons may still be learned from the arguments made by the majority and minority opinions in the case. The manner in which the case was argued set up a collision between the property rights of the people, on the one side, and the Crown's prerogative power, on the other: could the King interfere with such rights by levying the ship-money tax on the people without Parliamentary consent? There are two, sometimes overlapping, lines of reasoning to be discerned from the majority's decision, which sought to answer the aforementioned question. The first focuses on the duties the sovereign owes vis-à-vis its people – the *duty* argument. The second centres on the political circumstances at the time of the decision – the *political* argument.

The *duty* argument runs as follows. The *Hampden* majority agreed that the law provided the King with means, through prerogative powers, tenure, or tonnage and poundage, to keep the seas open and guard the coasts.<sup>46</sup> Where the King's resources were inadequate for ordinary needs, he ought to borrow those funds needed or obtain consent from Parliament, refraining from the levying of ship-money. However, the King is the sole judge to decide when an emergency situation exists and what means are required for defence – a duty to make adequate preparations for which the 'common consent in Parliament' was not required.<sup>47</sup> The latter was grounded in the maxim *lex non cogit ad impossibilia*: where a duty is imposed on the King to defend the kingdom, he must be conferred the necessary powers to fulfil that duty,<sup>48</sup> including the ability to take all those measures necessary to secure defence of the realm.<sup>49</sup>

Whilst differing amongst themselves, for current purposes it suffices to note that in contrast to the majority, the minority clung to a distinction between 'immediate' and 'apprehended' emergencies. Under the latter definition, the King

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<sup>46</sup> *Hampden* (n 2) 1081 (Crawley), 1200 (Hutton).

<sup>47</sup> *ibid* 1097.

<sup>48</sup> *ibid* 1187 (Jones): '[the King] cannot be a king, unless he take the defence and protection of his people upon him'.

<sup>49</sup> *ibid* 1226 (Finch), cf 1210 (Davenport).

cannot take any such steps that involved encroachment upon the subject's property and must instead summon Parliament for their approval.<sup>50</sup> This author supports Kier's contention that the minority's position put forward two arguments which were, ultimately, 'mutually destructive'.<sup>51</sup> They asserted at once that the King *must* provide for national defence, but that he was not free to do so if it involved any interference with property.<sup>52</sup> Instead the majority's position is preferred: if an emergency existed, it should make no difference whether it were near or remote: 'will you suffer an enemy to come in before you prepare to resist?'.<sup>53</sup> Ultimately, the position adopted by the majority may be rationalised as a response to the question of whether, assuming the realm to be in danger, the King's right and duty to provide against the danger should be brought to a standstill by the subject's right to his property, which must subsist until the 'very moment the storm has burst on the realm' and its safety has been 'irreparably destroyed'.<sup>54</sup> It is therefore reasonable to conclude that the majority were correct in finding against John Hampden.

The *political* argument is less developed and in some ways feeds off of the *duty* argument. Whilst the duty argument focuses narrowly on the need for the sovereign to enforce its duty to the people, the political argument widens the lens slightly to accommodate the wider political circumstances of the time. Though based on the same premises, the latter concludes in a slightly different manner. Having framed the question as a matter of tension between the sovereign's duty and the people's rights, and having taken into account the constitutional circumstance of the time, the Court of Exchequer noted that the last Parliament 'stirred up nothing but confusion and discontentment, as we now feel it to our great prejudice'.<sup>55</sup> For Weston, while the consent of Parliament may have been the ideal, sometimes Parliament 'may be so dilatory, that the kingdom may be lost in the meantime'.<sup>56</sup> Thus, Keir concludes, the majority were 'not easily persuaded

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<sup>50</sup> *ibid* 1134 (Crooke): '(...) for a general charge of money upon the people, it cannot be upon any *pretence* of *danger* or *necessity*'.

<sup>51</sup> Keir (n 29) 550.

<sup>52</sup> *ibid*.

<sup>53</sup> *Hampden* (n 2) 1189 (Jones), 1234 (Finch).

<sup>54</sup> Keir (n 29) 557.

<sup>55</sup> *Hampden* (n 2) 1196 (Hutton).

<sup>56</sup> *ibid* 1075 (Weston): 'Will you have forces on both sides, and restrain the king to his power by parliament, which may be so dilatory, that the kingdom may be lost in the

that Parliaments would always be speedy, wise or generous; and few who have read the history of Charles' first four years as King will think this view unreasonable'.<sup>57</sup> In 1625, for example, Parliament sat for only three months before being dissolved and dubbed the 'Useless Parliament' by the King having passed no meaningful legislation. The crux of the political argument is found in the Court's conclusion, drawn from the political circumstances of the times and exemplified in a distinct message: for the majority in *Hampden* 'it was safer to say "trust the king" than "trust the Parliament"'.<sup>58</sup>

If, despite superficial similarities, these arguments made in *Hampden* cannot be of direct application to the *Miller* judgment, what can we nevertheless learn from it? There are two lessons. First, when seeking to attribute responsibility between the Crown and Parliament, we can learn from the *duty* argument that in order to act *fairly* between the bodies, the Court must give those under a relevant duty the effective opportunity to effectuate that duty; in other words, an opportunity to choose which they have reason to value.<sup>59</sup> Thus, the attribution of responsibility takes place on terms we the people could not reasonably reject. Second, in support of this first contention, the *political* argument can teach us that any such analysis must seek to compensate for the relative institutional competencies of the constitutional actors.<sup>60</sup> Taken together, these lines of reasoning provide us with sufficient tools to defend the *Miller* judgment.

#### IV. CRITICISING MILLER

With this in mind, we can fast-forward from *Hampden* (several hundred years, a constitutional revolution and a few national referendums later), to the Supreme Court judgment in *Miller*. In both the Divisional Court and Supreme Court, the

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mean time?'. Weston asks the rhetorical question: 'Is it not better to endure a mischief, than an inconvenience?'

<sup>57</sup> Keir (n 29) 557.

<sup>58</sup> *ibid.*

<sup>59</sup> This defence of *Miller* ultimately rests in large part on a unique account of when it is fair to delegate responsibility between actors of value. See Voyiakis (n 3) for a well-written reorientation of the private law of torts using such an account.

<sup>60</sup> As is well-established by what some have called the tradition of *institutional pragmatism* whereby the Court seeks 'to compensate for perceived or actual weaknesses of [other] constitutional players'. See CJS Knight, 'Bi-Polar Sovereignty Restated' (2009) 68 CLJ 361.

reasoning appears to be a strong and simple affirmation of Parliamentary sovereignty. In contrast to the prerogative power to make and unmake international treaties, the ‘superior norm’ was that Parliamentary consent is required to change domestic law. However, those criticising the UKSC appear to be seeking reasons as to *why* this ought to be so. The Court was asked to choose between two principles regulating the prerogative power. Stating that one takes precedence over the other simply by virtue of superiority seems inadequate. What is required is a normative argument for the majority’s conclusions.

The UKSC judgment does put forward suggestions. But, as will be explored below, for some, the Court’s dual assertion that: (1) it was more realistic to view EU law *as* domestic law; and (2) that withdrawal from the EU was of ‘fundamental constitutional’ implication, were deficient. Such argumentative deficiency would seem to indicate that: (a) the majority’s ruling was one which made no practical difference;<sup>61</sup> and (b) that the UKSC’s reasons for reaching its conclusions were insufficiently explained, which thereby indicated that it had other reasons for its findings.<sup>62</sup> Throughout this article, these arguments are referred to as the ‘critique of formalism’ or the ‘formalism critique’. What the minority called ‘an exercise in pure legal formalism’<sup>63</sup> foreshadows much of the criticism and a more wide-ranging debate concerning legal realism and judicial reasoning. At its core, the critique of formalism exhibits three key elements: (1) the UKSC was unjustifiably divorced from practical *reality*; (2) it insufficiently *explained* its reasoning; and further, or in the alternative, the (3) UKSC was in any case simply *not justified* in reaching the conclusions it did.

The need to defend the UKSC is perhaps not paramount, but should similarly not be understated. After all, as mentioned already, before the hearing of the appeal in the Supreme Court, large sections of the British press came with a well-documented reply to the Divisional Court decision: the judges were ‘enemies of the people’.<sup>64</sup> As Barber and King cautiously remark, ‘the reaction to Miller

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<sup>61</sup> As expressly stated by in *Miller* (n 1) [273] (Lord Carnwath).

<sup>62</sup> The general, broad-brush critique of the legal realists, see further Joseph W Singer, ‘The Player and the Cards: Nihilism and Legal Theory’ (1984) 94 Yale L J 1.

<sup>63</sup> *Miller* (n 1) [273] (Lord Carnwath).

<sup>64</sup> Claire Phipps, ‘British Newspapers React to Judges’ Brexit Ruling: ‘Enemies of the People’ *The Guardian* (London, 4 November 2016) <<https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling>> accessed 27 January 2018.

presents a grave threat to our constitutional order, a threat both to the rule of law and to the very structure of democracy in the United Kingdom’ – in short it undermines the legitimacy of judicial decision-making.<sup>65</sup> This cause for concern is only strengthened when academic commentators such as Feldman<sup>66</sup> and Elliott,<sup>67</sup> forthcoming with strong criticism of the *Miller* judgment, level stringent criticism at the UKSC.

Whilst keeping the scope of this essay focused narrowly on the tension between prerogative powers and Parliamentary consent, this contribution hopes to find the main criticisms of the reasoning of the UKSC in *Miller* wanting.<sup>68</sup> It does so by setting out and subsequently defending each of the different key elements of the UKSC’s reasoning. Finally, this article shows that the decision is positively justified by reference to the lessons learned from *Hampden*. Far from reaching conclusions contrary to the ‘will of the people’, the UKSC sought to uphold the common good. Overall, then, the critique of formalism is misplaced as the UKSC was ultimately justified in reaching its final conclusion, both as a matter of practical reality and the common good of the people. The UKSC in *Miller* showed itself alive to such criticisms and correctly emphasised the flexibility of the British Constitution.

### **‘Direct and Independent’ EU Law**

A crucial part of the UKSC’s reasoning hinged on the notion that with the ECA, EU law became a ‘direct and independent source of domestic law’.<sup>69</sup> For the majority, whilst ‘in one sense’ UK law ‘is the source of EU law’ because without the ECA EU law would have no domestic status, in a more ‘realistic’ sense the majority concluded that ‘it is the institutions of the EU which are the relevant source of EU law’ so EU law is an ‘independent and over-riding source of

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<sup>65</sup> Nick Barber and Jeff King, ‘Responding to Miller’ (*UK Con Law Blog*, 07 November 2016) <<https://ukconstitutionallaw.org/2016/11/07/nick-barber-and-jeff-king-responding-to-miller/>> accessed 27 January 2018.

<sup>66</sup> Feldman (n 22).

<sup>67</sup> Elliot (n 23).

<sup>68</sup> I will thereby avoid the other argument under appeal concerning whether the consent of devolved legislatures was required to effect withdrawal discussed in *Miller* (n 1) [136]. I will also avoid straying too far into jurisprudential debates concerning legal realism and its allies by not discussing whether the UKSC was correct to hear the case, although I inevitably thought it was. See Barber and King (n 65).

<sup>69</sup> *Miller* (n 1) [65], [80].

domestic law.<sup>70</sup> This led the majority to conclude that the prerogative cannot *in the first place* be used to alter EU law because that law *is* domestic law. The majority considered that this was consistent with Parliamentary sovereignty and therefore did not alter the rule of recognition in UK constitutional law.<sup>71</sup> The literature on the topic has not fully acknowledged this finding to be crucial to the majority's overall position. It was, however, recognised that traditional dualist theory dictates that international treaties are not normally considered part of domestic law until incorporated by statute.<sup>72</sup> Subtly, the majority conceded to that the dualist system is a 'necessary corollary of Parliamentary sovereignty [and that it] exists to protect Parliament not ministers.'<sup>73</sup> It was only, therefore, by bending this tradition and making EU law a source of *domestic law itself* that the majority opinion could be sustained.

Elliott strongly criticises this reasoning. The Court, Elliott notes, cannot maintain both that EU law is an independent source of domestic law and that the rule of recognition has not been altered because 'a source of law can only be independent in the relevant sense if it is acknowledged as a source of law by the rule of recognition.'<sup>74</sup> Thus the majority's reasoning is unclear and contradictory, contending that EU law is both dependent upon the ECA for its domestic status and an independent source of domestic law. For Elliott, as well as Lord Reed in the minority, if the rule of recognition has not changed, EU law was not domestic law – it only took *effect* in domestic law by reason of the ECA and so is dependent on that statute.

The criticisms can be taken in turn. The first issue pertains to the UKSC's reasoning and engages the need for the UKSC to sufficiently explain its reasoning if it is to completely avoid the critique of formalism. Much must turn on what is meant by 'realistic' in the context of the majority's reasoning. A close analysis of paragraph 61 suggests that the Court's reasoning hinges on a Kelsonian distinction between juristic law and fact. Kelsen sought to raise to the level of consciousness what all *jurists* are doing when they understand positive law as a

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<sup>70</sup> *ibid* [61].

<sup>71</sup> *ibid* [60].

<sup>72</sup> *JH Rayner* [1990] 2 AC 418, 500 (Lord Oliver).

<sup>73</sup> *Miller* (n 1) [57].

<sup>74</sup> Elliott (n 23) 272.

valid system.<sup>75</sup> For Kelsen, when a jurist applies the law to the facts of a case, he or she imputes legal *responsibility* which, in turn, presupposes a valid *formal* ‘basic norm’ that validates all other norms but is itself independent of empirical fact. Thus, when a jurist applies EU law to the facts of a case by an act of juristic imputation, he or she presupposes not just that it is a *direct independent* source of law, but also one that derives its substantive authority from the *fact* of Parliamentary approval through the ECA. In a Kelsonian analysis, the two are quite distinct as law and fact.<sup>76</sup>

As a matter of *explaining* their reasoning in reply to the critique of formalism, a close reading of paragraph 61 demonstrates that the Court reasoned by contrasting examples of law and fact, which reflected the Kelsonian distinction outlined above. Whilst it is true that the Government can influence the outcome of EU legislative processes, ie the factual substance of EU law, the creation or abrogation of ‘rules of law’ without the specific sanction of any UK institution take ‘automatic and overriding effect’, ie as a matter of juristic form or law, without any further act by Parliament.

These arguments did not only coincide with the acts of jurists in ivory towers. The majority took Raz’s criticism of Kelsen’s theory, arguing that one must not ignore the ‘the attitude of the population and the courts’ in deciding ‘the identity and unity of a legal system’, to heart.<sup>77</sup> Not only was this more realistic as a matter of Kelsonian juristic thinking, but adopting the ‘attitude of the population’ draws attention to the fact that the entire narrative of the leave campaign was based on the idea that the EU compromised British sovereignty. In *Miller*, the majority gave this message its best effect possible while also preserving the rule of recognition and in doing so exhibited a ‘degree of innovation and sophistication’.<sup>78</sup> Here, then, the critique of formalism, if it asked questions of the UKSC’s ability to engage with political realities of 2016, also fails.

The UKSC maintained that all of the aforementioned did not alter the rule of recognition.<sup>79</sup> As Poole has convincingly demonstrated, by distinguishing

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<sup>75</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory* (OUP 1992) 58.

<sup>76</sup> *ibid.* The former being defined as acts of will ‘directed at a definite human behaviour’.

<sup>77</sup> Joseph Raz, ‘Kelsen’s Theory of the Basic Norm’ in Joseph Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 128.

<sup>78</sup> Poole (n 13) 703.

<sup>79</sup> *Miller* (n 1) [67].



between Parliament as a constituent agent and a legislator (creator of general norms), the rule of recognition remains unaltered. It is perfectly coherent to argue that EU law has primacy at the level of ordinary law (government), but that it itself did not alter the fundamentals of constitutional order (sovereignty).<sup>80</sup> According to the majority, therefore, it seemed more realistic to say that EU law *is* domestic law, instead of only *taking effect* in domestic law.

Once EU legislation is portrayed in this manner, it follows that whilst the ECA could accommodate the varying content of EU law, for example through the enactment of EU legislation, it could not accommodate withdrawal. The UKSC reasoned that even though the content of EU law could vary, ‘the very formula [established by s 2] is not itself variable: it is a fixed rule of domestic law, enacted by Parliament.’<sup>81</sup> Again, the logic of the Kelsonian form/substance distinction allows for this: the content of EU law could be varied in *fact*, whilst not being removed altogether as a matter of law.

### **Fundamental Change**

The other significant point that arises from the rest of the UKSC’s judgment, and which must be defended if the critique of formalism is to be fully displaced, is the emphasis accorded to the notion that Article 50 TEU would bring about a *major constitutional change*. The UKSC relied extensively on the idea the ECA had an ‘unprecedented effect’ in 1972.<sup>82</sup> Thus notification under Article 50 TEU was said to be ‘far-reaching’,<sup>83</sup> amounting to a ‘major change to UK constitutional arrangements which cannot be achieved by ministers alone’.<sup>84</sup> Indeed, whenever it turned to deal with crucial submissions advanced by the Government, as a ‘recurring theme’<sup>85</sup> the UKSC would fall back on the assertion that such ‘fundamental change’ could be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.<sup>86</sup> This will be called the *fundamental change* argument.

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<sup>80</sup> Poole (n 13) 703.

<sup>81</sup> *Miller* (n 1) [82]: ‘All such [members of a specified category] as [satisfy a specified condition] shall be [dealt with in accordance with a specified requirement]’.

<sup>82</sup> *ibid* [81].

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid* [82].

<sup>85</sup> Elliot (n 23) 264.

<sup>86</sup> *Miller* (n 1) [82].

Elliott maintains several criticisms, most of which engage the *justifiability* facet of the formalism critique. First, the majority's reasoning implies that from the empirical *fact* of constitutional change flowed significant *legal* consequences.<sup>87</sup> This first criticism leads into the next two. Second, if the use of the prerogative really is now constrained by its capacity to do things that have a degree of constitutional significance beyond a given threshold, it becomes necessary to identify precisely where that threshold is located. Yet, the majority provide little by the way of guidance to show that such a distinction is of 'principled and predictable application'.<sup>88</sup> To demonstrate the problems with a threshold requirement of fundamentality, Elliott moots the counter-factual of leaving the European Convention on Human Rights ('ECHR'). Third, Elliott notes that it is not clear what more the argument of fundamentality adds. If the EU Treaties are domestic law, it must already be the case, therefore, that the prerogative cannot be used to remove such law, irrespective of whether removing this would effect a major constitutional change.<sup>89</sup>

We will begin by addressing the second criticism, as it appears the most intuitive, before dealing with the first and third together. McCormick provides guidance as to the threshold requirement: Section 2(1) of the ECA inserted a 'new criterion of recognition into an already functioning rule of recognition. Section 2(4) indicates it ranking above other criteria.'<sup>90</sup> Thus, in essence, the fundamental change argument had not so much to do with *scale*, as it had to do with *kind*. Section 2, in other words, created a criterion by which other domestic laws would be recognised as valid law. This is hinted at by the UKSC when they state that the ECA created 'a new constitutional process for making law in the United Kingdom.'<sup>91</sup>

One can test the aforementioned by applying it to Elliott's counter-factual of leaving the ECHR. The UKSC's reasoning suggests that leaving the ECHR would be a *fundamental change* (in the *Miller* sense) and that the Government would therefore need Parliamentary consent in order to withdraw. It is possible to

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<sup>87</sup> Elliott (n 23) 263.

<sup>88</sup> *ibid* 264.

<sup>89</sup> *ibid* 267.

<sup>90</sup> Neil McCormick, 'A Very British Revolution?' in Neil McCormick (ed), *Questioning Sovereignty* (OUP 1999) 83-87.

<sup>91</sup> *Miller* (n 1) [62].

acknowledge that the primary purpose of the Human Rights Act 1998 ('HRA') was to enable the rights and remedies of the ECHR to be enforced by domestic courts<sup>92</sup> while also maintaining that the HRA involves a 'constitutional process for making law' as a criterion of recognition. This is because common law rights cannot be asserted in the face of Parliamentary legislation, whereas Convention rights incorporated into domestic law by the operation of section 3 of the HRA can.<sup>93</sup> In the event of conflict with legislation, statute must prevail over the common law, but not so under the HRA with its eventual appeal to Strasbourg. The HRA, therefore, could be seen as adding another 'criterion of recognition' for valid domestic law through its strong 'interpretive obligation' and avenue of appeal.<sup>94</sup>

We can now turn to the first and third criticisms. These concern, first, the apparent *non sequitur* as the UKSC drew legal consequences from the fact of fundamental constitutional change and, second, the apparent failure of the fundamental change argument to add anything to the sources argument. Here, the Court showed its awareness as a constitutional player. The fundamental change argument shaped its response as a distinct constitutional agent, adding something more to the already established arguments and its *reasoning processes*, but not dictating the ultimate legal conclusion. Thus, the critique of formalism, not only as it pertained to justifiability and formal explanation, but also in so far as it engaged the practical engagement of the UKSC, again falls short.

To illustrate this, one can begin by examining the manner in which the fundamental change argument is made.<sup>95</sup> The UKSC began by considering the three categories of rights which could be removed by leaving the EU, reasoning that although many such rights could be replicated in a new statute, 'the need for such replication would only arise because withdrawal from the EU Treaties would have abrogated domestic rights created by the 1972 Act (...) [and] the *Court of Justice* would no longer have any binding role in relation to them'.<sup>96</sup> Having then laid out the Government's submission that the loss of these rights had been

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<sup>92</sup> *R (SB) v Governors of Denbigh High School* [2006] UKHL 15 [29] (Lord Bingham).

<sup>93</sup> *R (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening)* [2015] A.C. 657 (Divisional Court) [48] (Lord Dyson MR and Elias LJ).

<sup>94</sup> *R v A (Complainant's Sexual History)* [2002] 1 A.C. 45 (HL) [67]-[69] (Lord Steyn).

<sup>95</sup> *Miller* (n 1) [70]-[73].

<sup>96</sup> *ibid* [70] (emphasis added).

sanctioned by the 1972 Act,<sup>97</sup> the Court proceeded to reject these submissions by repeating the fact that there would be a fundamental constitutional change *four* times.<sup>98</sup> After the second, the UKSC emphasised that domestic rights would be open to repeal by domestic legislation since ‘they will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.’<sup>99</sup>

Two comments can be made on this reasoning. First, in contrast to the brief mentions of the fundamental change argument in the Divisional Court judgment,<sup>100</sup> the manner in which the fundamental change argument was set out by the UKSC was different. For repeating the argument numerous times exemplifies a Court that was at worst worried, and at best anxious. The repetitive and failsafe nature of the argument can, hence, accurately be described as ‘instinctual’.<sup>101</sup>

But, and second, what was the UKSC worried about? A clue is found in the way in which it dealt with the argument that withdrawal from the EU would result in a loss of rights. As noted above, the Court held that EU withdrawal would create a ‘*need*’ for replication.<sup>102</sup> But a *need* to have rights replaced is not a meaningful right itself: one does not have the right to the rights of a political community one is not a member of, whether these are currently enshrined in domestic law or not.<sup>103</sup> Thus, at best, this argument can only be read as identifying a *risk* that rights would be lost due to withdrawal from the EU *without replication* and that such a risk is only a *relevant* risk in terms of rights *protection* if there is some

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<sup>97</sup> *ibid* [74]-[77].

<sup>98</sup> *ibid* [78], [80], [81], [82].

<sup>99</sup> *ibid* [80].

<sup>100</sup> R (*Miller and Dos Santos*) (n 4) [83] and [88].

<sup>101</sup> Elliott (n 23) 285. Though this is not to suggest that the UKSC was simply falling back on some ill-defined assertion of the prerogative being an ancient, secret ‘relic of a past age’ which as a default matter could not be trusted (*Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75 at 101 (Lord Reid)), for such an approach was expressly disowned (*Miller* (n 1) [49]). Instead, it was in the ‘unique’ circumstances brought about by the ECA which introduced a new criterion of validity to which the UKSC altered its legal response.

<sup>102</sup> *Miller* (n 1) [87] (emphasis added).

<sup>103</sup> As Arendt has famously taught us legal rights are dependent on political citizenship which is the ‘right to have rights’. See Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Books 1994) 292.

potential for it to materialise – ie some potential *culprit*. We speak in terms of rights *protection* because, in the view of this author, rights have no value without protection.

Together, these two elements demonstrate a Court that is in some way worried or anxious about a risk to certain rights possessed by the claimants. This paper submits that the Court was worried about rights under the ECHR. Seemingly unnoticed by most in the academic debates surrounding *Miller*, the UKSC did not only emphasise the irrevocable nature of EU rights, but also touched upon the supervision of the ‘Court of Justice’<sup>104</sup> and the lack of further references. It did so twice in one paragraph and twice again in another.<sup>105</sup> This would thus seem to be the *relevant risk* in terms of rights protection that the UKSC was concerned with.

But what value does the European Court of Justice (‘ECJ’) have in terms of the fundamental rights protection of people like *Miller*? The UKSC could not have been sure that leaving the EU and the concomitant loss of rights would actually result in a meaningful reduction in fundamental rights protection. Not only is the failure of the ECJ with regards to fundamental rights protection well-documented (albeit still contentiously),<sup>106</sup> no argument was brought as to whether or not leaving the EU would amount to a violation of the claimants’ rights under the HRA. Fundamentally, all would depend on the final content of the ‘Great Repeal Bill’.<sup>107</sup>

Perhaps, then, the Court had in mind a different European court: the ECtHR. Perhaps the majority was trying to say that in relation to the abrogation of rights derived from an external European source, there was a *risk* that the ECHR would also be lost. Perhaps the UKSC was saying ‘this far, and no further’ – withdrawal from the ECHR as the irreducible minimum of fundamental rights

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<sup>104</sup> *Miller* (n 1) [70].

<sup>105</sup> *ibid* [80] ‘decisions of the Court of Justice will (again *depending on the precise terms of the Great Repeal Bill*) be of no more than persuasive authority, and there will be no further references’.

<sup>106</sup> The failure of the EU as a ‘guardian’ of fundamental rights, even with the European Charter of Fundamental Rights, is well documented. See eg Steven Greer and Andrew Williams, ‘Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?’ (2009) 15 *European Law Journal* 462, 477. Notwithstanding the *Kadi* litigation, the ‘ethos of EU law remains *structurally conditioned* to avoid dealing with human rights as a priority’.

<sup>107</sup> *Miller* (n 1) [80].

protection should not be effected without Parliamentary consent (if at all). Were this to happen in light of well-known repeat proposals by the Conservative Party to repeal the HRA, an applicant who considers their fundamental rights inadequately protected would be deprived of their invaluable final right of appeal (or ‘further references’) to the ECtHR as a body insulated from domestic political pressures in a manner the UKSC is not.

To bring the point home, we can call upon the UKSC’s political awareness exemplified by the political argument in *Hampden* can be called upon. By the time the *Miller* case reached the UKSC, it was well-known that the Government was to negotiate the withdrawal of the UK from the EU in the two years provided for by Article 50 TEU – conditions ideal for the strength and speed of prerogative powers.<sup>108</sup> In a political climate where all things European seem disdained, and in light of referendum majorities for a European exit and a Conservative Government previously dedicated to repealing the HRA,<sup>109</sup> there was therefore a risk that a prerogative power of withdrawal would be used against the ECHR. Thus, based on both the premise of turbulent constitutional times and the relative competences of the constitutional bodies, the UKSC adapted its reasoning to argue that the Government could not be trusted with the power to effectuate fundamental constitutional change. This is not a *non sequitur* fallacy as Elliott would portray it; rather, this paper argues that it was the UKSC demonstrating its acute awareness of the politics of the era. While Parliament was too slow and inefficient in 1637, the prerogative powers might have seemed just too fast for the UKSC in 2017. For the UKSC, then, it was easier to ‘trust Parliament’ than ‘trust the Government’.<sup>110</sup>

Thus, heeding the UKSC’s warning, that there remained a risk that the prerogative powers may be used to implement more changes to the constitution than bargained for in the 2016 referendum if the terms of the ‘Great Repeal Bill’ were not drafted with precision<sup>111</sup>, Parliament responded by inserting in the Great

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<sup>108</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765-69, OUP 2016) 1:162.

<sup>109</sup> Brexit seems to have at least delayed the charge for repeal, see Rebecca Hacker, ‘Minister Confirms Indefinite Delay In Plans to Replace the Human Rights Act’ (*Rights info*, 25 January 2017) <<https://rightsinfo.org/plans-replace-human-rights-act-put-hold/>> accessed 27 January 2018.

<sup>110</sup> Keir (n 29) 557.

<sup>111</sup> cf *Miller* (n 1) [80].

Repeal Bill the ostensibly ‘anomalous’<sup>112</sup> provision that Government’s powers could not be used to repeal the HRA.<sup>113</sup> Similarly, the Government responded by providing a section 19 statement, made by the David Davis, the ‘Brexit Minister’, on the front page of the Great Repeal Bill, which stated that the terms of the Bill were compliant with the UK’s obligations under the ECHR.<sup>114</sup> Overall, therefore, we can see part of what lay at the heart of the fundamental change argument: a warning to the other constitutional players. This might have taken a little explaining, but it was nothing more than could be expected of any constitutional theorist who remained alive to the politics of the age, as the UKSC; here again, therefore, all elements of the formalism critique fell short.

## V. THE HEART OF THE BREXIT CASE

So on what basis was *Miller* really decided? Left at this, the formalists could be right to say that the UKSC had other reasons – to those expressed in the judgment – for reaching its conclusions. Adverse consequences for the rule of law are a natural consequence thereof. I hold this to be false. At the heart of *Miller*, and in support of the suspicion of mistrust embodied by the political argument above, lies a basic, pragmatic fact. When faced with a fundamental change to the constitution, the sovereign body in the United Kingdom should always be given an *effective opportunity* to influence this change if it is to perform its proper constitutional function in (inter alia) promoting the good of the people. In short, the Supreme Court in *Miller* decided that if Parliament was to have any choice in the Brexit negotiations at all, it had to be a choice it had reason to value, namely one at the start of the two-year negotiations.

To understand the final defence of the majority’s position, furthermore, we must first understand its critical weakness. The argument for the majority rests on the footing that EU law had become an independent, overriding source of

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<sup>112</sup> Anomalous because the ECHR formally has nothing to do with the EU at all, see Joelle Grogan, ‘Legislation that Is, and Is Not: The Deeply Problematic Repeal Bill’ (*LSE Brexit Blog*, 17 July 2017) <<http://blogs.lse.ac.uk/brexit/2017/07/17/legislation-that-is-and-is-not-the-deeply-problematic-repeal-bill/>> accessed 27 January 2018.

<sup>113</sup> European Union (Withdrawal) Bill (2017-19) [50] s 9(3).

<sup>114</sup> *ibid.*

domestic law. That so, it would seem to inevitably follow that there was no question about the use of the prerogative.

However, the majority's ultimate conclusion only follows if the act of giving notification is itself an act removing domestic law. This was how the majority characterised it<sup>115</sup> and what allowed them to characterise a *need* for rights as a relevant legal consideration. Yet, as demonstrated by both Lord Hughes in the minority and by Feldman, the opposite could equally be argued: the notification did not fire a bullet, it merely signified 'the start of an essentially political process of negotiation and decision-making within the framework of that article' which depending on the *terms* of the final primary legislation might lead to rights being lost.<sup>116</sup> It is difficult to say which characterisation is right as the notification does not itself change domestic law but, at the same time, removing the Treaty would render it nugatory.

The dispute is really a semantic one, dependent on how one characterises EU law itself in the first place. If EU law is a source of domestic law, withdrawal from the Treaties is itself an act of changing/removing domestic law (per the majority). Although, as demonstrated above, this was the more realistic characterisation, this, in and of itself, is arguably insufficient justification to demonstrate *why* EU law should be characterised as such.<sup>117</sup> If, however, EU law is characterised as having *effect* in the UK by the ECA (per the minority), then notification is only the start of a two-year-long political process.<sup>118</sup> To this extent, all the characterisations of the Article 50 TEU trigger are somewhat misleading at a superficial level.

I say misleading at a *superficial* level because the analogy of a bullet being fired draws attention to a deeper, final aspect of the majority's reasoning: the question concerning which constitutional player was better *placed*, in terms of its constitutional capacity, to take *responsibility* for enacting the referendum result so as to minimise the *risk* that the will of the people would be frustrated. In doing so, the UKSC *chose* to characterise EU law in the way it did in order to distribute the responsibility of notification between the relevant constitutional players. It is

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<sup>115</sup> *Miller* (n 1) [94] (the majority).

<sup>116</sup> *ibid* [259] (Lord Carnwath).

<sup>117</sup> If Elliott is seeking a *non sequitur* in the UKSC's reasoning, this is where he ought to be looking.

<sup>118</sup> *cf Miller* (n 1) [245] (Lord Carnwath).



here where the *justifiability* or *alternative* facet of the formalistic critique could really bite: did the UKSC make the right choice?

## VI. MILLER, HAMPDEN, AND THE VALUE OF CHOICE

The reasoning in defence of *Miller* runs as follows. The starting assumption is that withdrawing from the EU *does* present a fundamental constitutional change in that it sought to change a constitutional ‘criterion of recognition’, either by way of legal *effect* through the ECA or by EU law as a ‘direct and independent’ source of domestic law. This proposition was defended above. Next, we draw on the lessons learnt from *Hampden*.

The starting point is to recognise, as the Court of Exchequer did in *Hampden*, that the sovereign – both Parliament and the Government – is under a *duty* to promote the common good of man.<sup>119</sup> Where there is a duty, there must be a right to enforce or undertake that duty.<sup>120</sup> The majority in *Miller* seemed to consider this duty at risk of breach and alluded to a disconnect between, on the one hand, the result of the referendum and, on the other, the exercise of power under Article 50 TEU. Ministers could have triggered Article 50 TEU ‘even if there had been no referendum or indeed, at least in theory, even if any referendum had resulted in a vote to remain.’<sup>121</sup> Thus, the sovereign, either Parliament or the Government, should have a right to enforce the referendum result and protect against the possibility that the will of the people would be frustrated.

This in itself does not distinguish between Parliament and the Government, for these concerns are arguably equally applicable to both. Arguably Parliament could also take a different path from that recommended by the referendum by, say, refusing to give the Government the authorisation required to trigger Article 50 TEU. The latter is the absurdity of the *Miller* case, which stokes in part the formalism critique: whichever body was to make the decision, *surely* it would not have mattered? As noted already, by the time *Miller* came before the UKSC, the Court was aware that both the Government and Parliament had

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<sup>119</sup> To reject this possibility, is to reject the legitimacy of democratic political authority *per se* and is, therefore, in the main sense of the term ‘unreasonable’ ignoring that we all wish to pursue our own basic goods in a range of reasonable ways. On this, see Jonathan Crowe, ‘Natural Law Beyond Finnis’ (2011) 2 *Jurisprudence* 293.

<sup>120</sup> *Lex non cogit ad impossibilia* as it was put in the context of *Hampden* (n 46).

<sup>121</sup> *Miller* (n 1) [91].

agreed to implement the referendum result.<sup>122</sup> *Surely* neither the Government nor Parliament would risk the wrath of the people? But, such a risk is always implicit in the very fact of a national referendum, merely ‘advisory’, ‘legally binding’, or otherwise, together with the *derived* constituent authority<sup>123</sup> of the sovereign.<sup>124</sup> One must decide, therefore, which body is better placed to protect against such a risk, were it to materialise.

As we have learnt from *Hampden*, one can begin by focusing on and evaluating the relative constitutional strengths and weaknesses of both bodies. Ultimately, these conditions, coupled with the risk of a frustrated referendum result, were part and parcel of the ‘background conditions’ in *Miller* against which the value the relevant constitutional actors would attach to their ability to *choose* in such circumstances must be evaluated.<sup>125</sup>

It is submitted that the only meaningful difference between Parliament and the Government can be found in the speeds with which the relevant bodies can act.<sup>126</sup> The minority were quick to point out that the Government’s constitutional legitimacy arises from the basic constitutional need for ‘unanimity, strength and dispatch’ because sometimes, to unite the wills of many and reduce them to one, ‘is a work of more time and delay than the exigencies of state will afford.’<sup>127</sup> Yet, the minority did not take this to its logical conclusion: if the only relevant risk is that the will of the people could be frustrated, the slower this occurred, the better.

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<sup>122</sup> *Miller* (n 1).

<sup>123</sup> Parliament exercises *derived* power on behalf of the people, see Poole (n 13) 704.

<sup>124</sup> The sovereign is under a duty to promote both what it *thinks* is the common good and what *is* the common will; notwithstanding a national referendum, the two may not always coincide so the sovereign must choose.

<sup>125</sup> cf Voyiakis (n 3) 87.

<sup>126</sup> Both Parliament and Government have a certain degree of ‘democratic pedigree’ as the Prime Minister is appointed through a democratic process, governs through the Cabinet, is accountable to Parliament, and is subject both to Parliament’s legislative supremacy and orders of the Court. See Timothy Endicott, ‘This Ancient, Secretive Royal Prerogative’ (*UK Con Law Blog*, 11 November 2016) <<https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/>> accessed 27 January 2018.

<sup>127</sup> Blackstone (n 108), a passage cited both by Endicott (n 126) and the minority in *Miller* (n 1) [160] (Lord Reed).

If Parliament, by contrast, were to demonstrate such an intent to frustrate the referendum result, given the time for legislation to pass through two heavily accommodated Houses of Parliament, the safeguards are much greater. A legislative act contrary to the expressed will of the people in a national referendum would be inherently difficult to pass – much less so than a simple letter written by the Prime Minister. Furthermore, the possibility that Parliament would legislate contrary to the outcome of the referendum would always be slim as it would have to balance the potential for revolt with what it considers the true fulfilment of their duty to promote the common good of the people.

Interests on all sides are therefore better protected if Parliament, not the Government, is given the power of notification under Article 50 TEU. As it was put in *Hampden*, the sovereign should not have to wait until the ‘very moment the storm has burst on the realm’ and its safety has been ‘irreparably destroyed’, before being able to act.<sup>128</sup> If the Government were to demonstrate an intent to frustrate the will of the people, Parliament should not have to stand by and wait. The ability to pre-empt the Government was a choice Parliament, and the people, had reason to value having.

In these respects, the speed with which Government could act conferred on it a great advantage over Parliament and, therefore, represented a significant risk to Parliament enforcing its duty to the people. This helps to explain what this author submits to be the central tenets of the majority’s reasoning. Having alluded to the possibility of a disconnect between Parliamentary intention and the Government’s actions,<sup>129</sup> the majority saw

(...) a substantial difference between (i) ministers having a freely exercisable power to do something whose exercise may have to be subsequently explained to Parliament and (ii) ministers having no power to do that thing unless it is first accorded to them by Parliament.<sup>130</sup>

Thus, ‘if ministers give notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally

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<sup>128</sup> Keir (n 29) 557.

<sup>129</sup> *Miller* (n 1) [91].

<sup>130</sup> *ibid* [92].

involved.<sup>131</sup> Given the speed with which the Government could implement such an action, this paper suggests that Parliament would be unable to fulfil its constitutional duty. So, as the majority themselves put it, there was a ‘good pragmatic argument’ for their final conclusion.<sup>132</sup>

The minority in *Miller* emphasised what some have considered the more *laissez faire* spirit that the prerogative powers would always be scrutinised by Parliamentary accountability mechanisms.<sup>133</sup> This would be a mistake. Hypothetically, if the Government sought to frustrate the referendum result, even with Parliamentary accountability mechanisms, Parliament – and, one might add, the people – would be left to pick up the pieces *ex post facto*. They would be forced to litigate, within the two year period, the hitherto undecided questions of: (1) whether the prerogative power in this context would be open to judicial review;<sup>134</sup> and (2) whether Article 50 TEU is revocable.

With regards to the latter, Parliament really would have no opportunity to govern as of *right*: whether Article 50 TEU is revocable is largely dependent on the willingness of other EU member states.<sup>135</sup> Intervention after the fact of an Article 50 notification was therefore not an opportunity Parliament had *at all*, let alone one it had reason to value. If Parliament were to comply with their duty to do the good of the people, and therefore maintain their reason to exist as a body of political authority at all, they had to do so at the start of the two-year process. If these arguments seem *ad hoc*, this is a feature, rather than a criticism, of the United Kingdom’s constitutional arrangement. In this sense, the majority were correct to recognise, by quoting with approval at the start of their judgment,

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<sup>131</sup> *ibid* [94].

<sup>132</sup> Referring to the work and time required to pass legislation, albeit in the two year negotiations period [100] and cf [92]: ‘The *major practical difference* between the two categories, in a case such as this where the exercise of the power is irrevocable, is that the exercise of power in the first category *pre-empts* any Parliamentary action.’

<sup>133</sup> cf Poole (n 13) 708.

<sup>134</sup> There was no discussion of such questions on appeal (*Miller* (n 1) [239] (Lord Reed)).

<sup>135</sup> Stijn Smismans, ‘About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters’ (*UK Con Law Blog*, 29 November 2016) <<https://ukconstitutionallaw.org/2016/11/29/stijn-smismans-about-the-revocability-of-withdrawal-why-the-eu-law-interpretation-of-article-50-matters/>> accessed 27 January 2018.

Dicey's assertion that the UK constitution is 'the most flexible polity in existence'.<sup>136</sup>

The minority made the same mistake as they did in *Hampden*, namely, maintaining a mutually destructive position: seeking to assert that Parliament was both at once under a constitutional duty to guarantee the common good of the people, but should have no choice in the matter, at least not until the Government acted, so that the danger was 'immediate' and it would have been too late. Moreover, while Lord Carnwath in the minority considered that 'legal formalism' was evident in that the majority's decision would 'do nothing to resolve the many practical issues' arising from the two year period,<sup>137</sup> neither would finding for the Government. Instead, the majority's reasoning provides real practical protection for Parliament from future unwanted fundamental changes to the constitution. So much for legal formalism. These considerations, I submit, all but obliterate the critique of formalism: it is a ship without sails.

Only the majority in the UKSC in *Miller*, therefore, created circumstances in which Parliament could effectively exercise its agency as a constitutional player. More so, it did so on terms the people could not reasonably reject. The minority, on the other hand, kept to the strict letter of dualist tradition. Doing so, ironically, amounted to an unjustified adherence to legal theory failing, amongst others, to recognise that the role of dualist theory is to protect Parliament.<sup>138</sup> If the Government were given the power of notification, Parliament would have been provided with no protection from its swift manoeuvres: all facets of the formalism critique, ie the needs for formal explanation, justification, and a connection with reality, therefore fail.<sup>139</sup>

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<sup>136</sup> *Miller* (n 1) [40] citing Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 87.

<sup>137</sup> *ibid* [273].

<sup>138</sup> *ibid* [57].

<sup>139</sup> Though let us not forget another valuable lesson to be learnt from *Hampden* (n 2) 1217 (Sir John Finch): 'in the debating of this case, there hath been great variety of opinions among the judges, [which] shews commonly the difficulty of the thing, and argueth a candor and clearness in the judges, between whom combination and conspiracy would be most odious. All that hath gone before me, have one thing agreed, that it is the greatest case that ever came in any of our memories, or the memory of any man'.

## CONCLUSION

Shortly after the 1972 Act came into force, Lord Denning MR famously spoke of the European Treaty as 'like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back (...)'.<sup>140</sup> It would seem appropriate then that just as the UK courts' awkward relationship with the EU set sail with a case on the Merchant Shipping Act 1988,<sup>141</sup> so it should finish with reflections upon a case concerning ship-money. This note has sought to elucidate upon and defend the majority's reasoning in *Miller* so it may escape the critique of formalism. In doing so, the article relied on the past, ie *Hampden*, for guidance and sought to venture forward to contribute to current debates on the immediate future of Britain, particularly in relation to the ECHR.

In closing his work on *Hampden*, Kier notes that the reasons for the Court of Exchequer Chamber siding with the King could

(...) be the force of the arguments which placed the safety of the realm in the hands of an individual assumed to be well-informed and disinterested, rather than an assembly [such as Parliament] inexperienced, selfish, and short-sighted. A very different [Parliament] from that dissolved in 1629 had to develop before the royal prerogative could safely pass under its control.<sup>142</sup>

A few hundred years later and Parliament is indeed a very different body. Parliament, for all its continued shortcomings and criticisms, could be trusted with the valuable choice under Article 50 TEU. The courts gave Parliament that choice by means of *Miller*. Far from being enemies of the people, therefore, the UKSC has again proved itself, as its forebear did in 1637, to be quite the opposite.

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<sup>140</sup> *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

<sup>141</sup> *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

<sup>142</sup> *Keir* (n 29) 574.