was made clear by *Shindler*,[80] that could have been dealt with without an Article 267 reference, in what after all is only the first step of a long journey towards Brexit, in which Parliament will continue to play an essential role, as it has done thus far. So although the restatement of parliamentary sovereignty is eye-catching, it is not clear what or whose purpose has been served by the *Miller* litigation.

R (Miller) v *Secretary of State for Exiting the European Union*: Three Competing Syllogisms

Nicholas Aroney*

The *Miller* case concerned the constitutional requirements for the UK to give notice of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union. The parties made submissions in terms of two competing syllogisms. The Government argued that ministers, exercising Crown prerogative, had the power to give notice without statutory authorisation. The Applicants argued that the process required authorisation by Act of Parliament because the UK's withdrawal would deprive people of rights arising under EU law. However, a majority of the Supreme Court decided in favour of the Applicants based on a third and significantly different syllogism, based on the proposition that the European Communities Act had established EU law-making and law-interpreting institutions as new 'sources of law'. This note assesses the three competing syllogisms and examines the constitutional significance of the majority's proposition that these new EU sources of law were integrated into UK domestic law without disrupting the principle of parliamentary sovereignty.

INTRODUCTION

The referendum on Britain's withdrawal from the European Union was, from an international point of view, one of the most important political events of

accordance with its own constitutional requirements', which returns one to the issue in the current proceedings' (*Miller* n 6 above at [104]). But in fact it does not return to the issue of the *Miller* proceedings, but rather opens up a new line of inquiry. If Article 50 was a statutory power, the prerogative would be irrelevant and displaced (*De Keyser* n 29 above), and the question would be simply one of determining whether constitutional requirements had been met. Given the nature of the British constitution it is difficult to see how these 'requirements' had not been met on grounds explained in the text.

80 *Shindler* n 25 above, especially *per* Elias LJ.

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2016. Britain's anticipated departure from the EU will not only have immediate and momentous implications for the people of Britain and the nations of Europe, it will have significant ramifications for people throughout the world. What is more, the wider consequences are not only political and economic; they are profoundly constitutional. For the legal questions raised in *R (Miller)* v *Secretary of State for Exiting the European Union* (*Miller*), concerning the requirements imposed by the British constitution on the process by which the UK can withdraw from the EU, have a special resonance in countries within the British Commonwealth of Nations, whose theories of executive power and parliamentary authority are rooted in the historic prerogatives of the British Crown and the sovereign powers exercised by the Parliament at Westminster.[1] It is therefore very important that we are clear about what the Supreme Court meant when it decided in *Miller* that British ministers could not give notice of the UK's intention to withdraw from the EU without first being authorised to do so by an Act of Parliament.[2] The issues in the case pose a fascinating puzzle about the nature of the legal relationship between governments and legislatures in Westminster-derived systems of government throughout the world.

At the heart of the case, initially, were two competing syllogisms, one which suggested that government ministers, exercising the prerogatives of the Crown, already had the power to initiate the process of Britain's withdrawal from the European Union, and a second which suggested that the process could not be initiated without specific authorisation by an Act of Parliament. The parties in the case made their submissions in terms of these two competing syllogisms, the Government arguing that the international prerogatives of the Crown were sufficient, the Applicants arguing that statutory authorisation was required. However, in a move unexpected by the parties and commentators alike, a majority of the Supreme Court devised a third and significantly different syllogism, on the basis of which they resolved the case in favour of the Applicants. In this note these three competing syllogisms are explained and examined.

The note begins by describing the first two syllogisms and showing how they operated in the decisions of the two lower courts that considered the question. The note then explains how the Supreme Court came to formulate its alternative third syllogism. It does this by reviewing the legislation that was crucial to establishing the minor premises of the first two syllogisms and then by showing how difficulties in establishing those minor premises gave rise to the need for an alternative line of argument if the Court was to find, as it did, in favour of the Applicants. Through this third syllogism, it is argued, the majority of the Court circumvented the UK's traditional dualist approach to the relationship between domestic law and international treaty law by arguing that the UK's membership of the EU constituted the EU treaties and law-making institutions as new sources of domestic law, established as integral parts of the UK's internal legal order. The note shows how the majority's development of

1 See, for example, P. Sales and J. Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) 124 *Law Quarterly Review* 388.

2 *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017) (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge; Lord Reed, Lord Carnwath and Lord Hughes dissenting).

this third line of argument went well beyond anything the Applicants, let alone the myriad of commentators, had been arguing prior to and during the case. The note closes by reflecting on the nature and significance of the Court's reasoning, both within the UK and beyond it, particularly when the issues in the case are juxtaposed against corresponding sets of questions that arise within multi-jurisdictional systems of governance generally.

TWO COMPETING SYLLOGISMS

Miller came before the Supreme Court as an appeal from a decision of the Divisional Court of England and Wales[3] and the reference of devolution issues for resolution following a decision of the Northern Ireland High Court.[4] The principal issue was whether formal notice of the UK's intention to withdraw from the European Union under Article 50 of the Treaty on European Union (TEU) could lawfully be given by UK ministers without authorisation by an Act of Parliament.[5] The devolution issues focused attention on the further question whether that notice could be given without the Government first consulting with, or securing the agreement of, the devolved legislatures of Scotland, Wales and, in particular, Northern Ireland.[6]

According to the main submissions of the parties, there were two competing principles at stake. Put in their most simple form, the two principles were: (a) ministers of the UK government, exercising the prerogatives of the Crown, normally have the power to enter and withdraw from treaties, and (b) ministers do not normally have the power under the prerogative to make changes to UK law or alter legal rights.[7] All members of the Supreme Court accepted the validity of these two principles in one form or another.[8] The qualifying term 'normally' is important here, however. For it is also an accepted proposition of UK law that both principles are subject to any Act of Parliament that provides to the contrary. Thus, the power of ministers, in the name of the Crown, to enter and withdraw from treaties can be controlled, qualified, replaced or abrogated by Parliament; and Parliament can authorise ministers to exercise powers that result in changes to UK law.

3 *R (Miller)* v *Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) *per* Lord Thomas of Cwmgiedd LCJ, Sir Terence Etherton MR and Sales LJ (*Miller* (DC)).

4 *Re McCord, Judicial Review* [2016] NIQB 85 (28 October 2016) *per* Maguire J (*McCord* (HC)).

5 *Miller* n 2 above at [2] *per* the majority, at [154] *per* Lord Reed, at [276] *per* Lord Hughes.

6 *ibid* at [6] *per* the majority, at [156]-[157] *per* Lord Reed. For the specific questions raised by the devolution reference, and their resolution, see *ibid* at [126]-[151] *per* the majority, at [242] *per* Lord Reed, at [243] *per* Lord Carnwath, at [282] *per* Lord Hughes. All members of the Court rejected the argument that the consent of the devolved legislatures was legally required, largely on the ground that such requirements, notwithstanding their statutory recognition in the Scotland Act 1998, remain matters of convention, not law, and that conventions are not enforceable as such by the courts: see, in particular, *ibid* at [141]-[151] *per* the majority.

7 See *ibid* at [277] *per* Lord Hughes.

8 *ibid* at [5] *per* the majority, [159] *per* Lord Reed, at [244] *per* Lord Carnwath and at [277] *per* Lord Hughes.

Thus, while the giving of notice under an international treaty such as Article 50 TEU would ordinarily fall within the prerogatives of the Crown, this is always subject to the power of Parliament to legislate to the contrary. The central question in *Miller* accordingly became whether the power to give notice was somehow abrogated or restricted, either because a statute prohibited UK Ministers from doing so, or because to do so would have the effect of changing UK law or abrogating or frustrating rights established by statute. However, two answers could be given to these questions, depending on whether one started with the first or the second of the two competing principles. This resulted in two lines of argument, which can be reconstructed into the form of two competing syllogisms.[9]

Syllogism A

Major Premise A: The Crown has the prerogative power to give notice under Article 50, unless this is abrogated or regulated (expressly or impliedly) by Act of Parliament.

Minor Premise A: No Act of Parliament expressly or impliedly abrogates or regulates the Crown's prerogative power to give notice under Article 50.

Conclusion A: The Crown has the [unabrogated and unregulated] prerogative power to give notice under Article 50.

Syllogism B

Major Premise B: The Crown cannot exercise its prerogative powers to change the law or abrogate or frustrate rights enacted by Parliament, unless this is authorised by Act of Parliament.[10]

9 For early discussion of the syllogisms in the case, see J. Finnis, 'Terminating Treaty-based UK Rights' *UK Constitutional Law Association* 26 October 2016; P. Craig, 'Miller: Alternative Syllogisms' *Oxford Human Rights Hub* 23 November 2016. R. Craig, 'Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum (2016) 76 *Modern Law Review* 1019 proposed a different distinction, between situations (a) where statute and prerogative overlap and the prerogative goes into abeyance and (b) where they do not overlap and yet the prerogative cannot be used to frustrate the intention of Parliament. In *Miller*, the Applicant argued that the prerogative could not be used to 'frustrate rights' created by the relevant statutes: see *R (Miller)* v *Secretary of State for Exiting the European Union*: Written Case for the Lead Claimant at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, 2(3)(a), (4)(b), 17-18, 29(4), 32, 38, 43(1) and 44 (last accessed 20 April 2017). Thus deployed, the frustration principle, affirmed by the majority, was absorbed into the logic of Syllogism B: compare *Miller* n 2 above at [51] *per* the majority and [266] *per* Lord Carnwath. Of the minority, only Lord Carnwath gave the frustration principle sustained attention, but dismissed it as 'wide of the mark' (*ibid* at [246], [250]-[251], [265]-[266]). Lord Reed referred to it in passing (*ibid* at [185]), while Lord Hughes said nothing about it all.

10 If authorised by Parliament, the power of course becomes statutory in nature, rather than a common law prerogative: *Attorney General* v *De Keysers' Royal Hotels Ltd* [1920] AC 508, 575 *per* Lord Parmoor (*De Keyser*).

> Minor Premise B1: The laws and rights created by or under the European treaties and given domestic effect by Acts of Parliament are laws and rights enacted by Parliament.
>
> Minor Premise B2: An exercise by the Crown of power to give notice under Article 50 would change the law and abrogate or frustrate the rights created by or under the European treaties and given domestic effect by Acts of Parliament.
>
> Minor Premise B3: No Act of Parliament authorises the Crown to exercise its prerogative power to give notice under Article 50.
>
> Conclusion B: The Crown cannot exercise its prerogative powers to give notice under Article 50 and thereby change the law and abrogate or frustrate the rights created by or under the European treaties and given domestic effect by Acts of Parliament without authorisation by Act of Parliament.

Assuming the premises to be correct, both syllogisms are logically compelling. So, most of the argument in the case was directed to the validity of the premises. In the case of the major premises, this turned largely on the Court's interpretation of the relevant case law,[11] while the validity of the minor premises turned largely on the Court's construction of the relevant statutes.[12] The Government argued for the minor premises of Syllogism A and against those of Syllogism B, while the Applicants argued for the minor premises of Syllogism B and against those of Syllogism A. However, because the major and minor premises of the two syllogisms are not logically contradictory propositions, it remained possible, at least in theory, that both syllogisms were valid. This made it necessary to consider which of the two major premises would prevail over the other in such an event.

This question of which principle would govern the case was further complicated by the possibility that the two principles might, on closer examination, turn out to be two sides of the one coin. Certainly, the history of English law suggests a common origin for the two principles in the tumultuous events of the seventeenth century, which culminated in Parliament's decisive assertion of its supremacy over the Crown and the willingness of the courts to affirm that this was the case. However, history also suggests a mixed provenance for the principles in the case. For there are two important sources for the proposition that ministers do not normally have the power to make changes to UK law: Lord Coke's dictum in the *Case of Proclamations* 'that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament',[13] and the Bill of Rights 1688, which declares that 'the pretended Power of Suspending of Laws or the Execution of Laws' and 'the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall'.[14]

11 See nn 16 and 19 below.
12 See section 'The Statutory Background' below.
13 *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352 *per* Sir Edward Coke CJ.
14 Bill of Rights 1688, 1 Will and Mary sess 2 c 2.

Is the source of the principle a statute enacted by Parliament, the common law declared by the courts, or somehow both? That it might, in a sense, be both cannot be discounted, for in the seventeenth century the doctrine of natural law was widely accepted and it was understood to be the ultimate task of the King's Courts and Parliament alike to discover and apply the dictates of divine law, natural reason and received custom to the circumstances of the time.[15] Only since the rise of legal positivism are we inclined to discriminate sharply between the authority possessed by the two institutions. Thus, in today's context, we want to know: are the two competing major premises expressions of the one basic principle of parliamentary sovereignty; and does that principle depend, ultimately, on the judgments of courts or the statutes of Parliament—or somehow both?

Whatever the answer to these questions may be, the two syllogisms operated differently in the context of *Miller*. Under Syllogism A, the key question was whether a relevant statute *negatively* restricted or abrogated the prerogative power to give notice under the treaty, whereas under Syllogism B the key question was whether a statute *positively* conferred the power to give notice and thereby initiate the process of withdrawal from the EU. Thus, while it might be said that the two questions were mirror images of each other, they were *reversed* mirror images, for there was no simple equivalence between them when applied to the facts of the case. The existence of two *competing* principles, each framing the ultimate question in a particular way, remained the central problem that had to be addressed.

The significance of the two competing principles was well illustrated by the reasoning in the two lower court decisions from which the Supreme Court proceedings were derived. In essence, the Northern Ireland High Court considered that Syllogism A governed the case[16] and concluded (for reasons that will not be addressed in this note) that the provisions of the Northern Ireland Act 1998 did not regulate or displace the Crown's prerogative power to give notice under Article 50.[17] The Divisional Court of England and Wales, on the other hand, denied that Syllogism A applied,[18] decided instead that Syllogism B governed the case,[19] and concluded that, in the absence of an authorising statute, the Secretary of State could not exercise the Crown's prerogative to give notice under Article 50.[20]

15 R. H. Helmholz, *Natural Law in Court* (Cambridge: Harvard University Press, 2015) 120.

16 *McCord* (HC) n 4 above at [66]-[84], relying especially on *De Keyser* n 10 above, but also considering *Laker Airways Limited* v *Department of Trade* [1997] 1 QB 643; *R* v *Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513; *R* v *Secretary of State for the Home Department ex parte Northumbria Police Authority* [1989] QB 26 and *R (Alvi)* v *Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants Intervening)* [2012] 1 WLR 2208.

17 *McCord* (HC) *ibid* at [85]-[108]. The High Court also considered and rejected other arguments associated with the devolution issues: *ibid* at [109]-[157].

18 *Miller* (DC) n 3 above at [80]-[81], [84]-[85].

19 *ibid* at [25]-[29], [86]-[88], [92]-[94], [95]-[96] and [104]. The Divisional Court's affirmation of Syllogism B was expressed partly in its response to the contrary arguments of the Government (at [86]-[88] and [92]-[94]). In addition to the cases cited in note 16 above, the Divisional Court especially relied on *The Case of Proclamations* n 13 above and *The Zamora* [1916] 2 AC 77 as establishing Major Premise B.

20 *Miller* (DC) n 3 above at [111].

When, on 24 January 2017, a majority of judges of the Supreme Court upheld the decision of the Divisional Court, it might have been expected that they, too, had rejected Syllogism A and adopted Syllogism B. However, curiously, the Supreme Court's reasoning did not involve a simple application of Syllogism B. For the application of the syllogism proved to be more complex and difficult than might have been anticipated. In a single paragraph embedded in the middle of their judgment the majority said that the Divisional Court had been correct to hold that 'changes in domestic rights' represented 'another, albeit related, ground' for justifying the conclusion that prerogative powers cannot be invoked to give notice to withdraw from the EU treaties without parliamentary approval.[21] However, the main thrust of the reasoning of the majority, extending over many paragraphs in the judgment, depended on a more fundamental and far-reaching argument than this.[22]

This raises an important question: why did the majority of the Court adopt a line of reasoning that, as I will argue, was not specifically advanced by the parties? The answer seems to be that the Applicants faced problems in establishing their position that were not fully acknowledged by the Divisional Court. But to understand these difficulties, and the alternative line of argument upon which the majority of the Supreme Court grounded their decision, it is necessary to review the several statutes enacted by the UK Parliament that have dealt with the UK's membership, initially of the EC, and later of the EU.[23] For the case did not turn only on the major premises in the two syllogisms, but also on the minor premises, and it was the legislation that was central to the establishment of those minor premises.

THE STATUTORY BACKGROUND

The most important of the statutes which address the UK's membership of the EC/EU is the European Communities Act 1972 (ECA). The most evident purpose of the ECA was to ensure that the provisions of the EC treaties and laws created pursuant to those treaties would, to the extent required, have direct effect in UK law.[24] This was necessary because the UK adheres to the dualist theory of the relationship between international treaties and domestic law: ratification of a treaty creates rights and duties in international law, but a

21 *Miller* n 2 above at [83]. See also at [59], referring to the arguments as to whether the giving of notice without statutory authority would 'impermissibly result in a change to domestic law', at [69]-[73], discussing the Divisional Court's assessment of the rights that would be affected by withdrawal and at [84], rejecting the Government's response that prerogative powers *can* alter domestic law.

22 See the section 'Avoiding dualism' below.

23 Namely, the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community.

24 That is, in accordance with the understanding of the effect of EC law within Member States that had been affirmed by the European Court of Justice, although not necessarily in accordance with the reasons advanced by the Court as to why this was the case. Compare Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, ECLI:EU:C:1963:1, 12; Case 6/64 *Costa* v *ENEL* [1964] ECR 585, ECLI:EU:C:1964:66, 593-594; and *Thoburn* v *Sunderland City Council* [2003] QB 151 at [58]-[59] *per* Laws LJ (*Thoburn*).

statute is generally required to translate those rights and duties into domestic law.[25] The ECA achieved this by providing that every provision of the treaties and every provision of EC law that was meant to be given direct effect in the Member States would be given that effect in UK law.[26] When it was enacted, the Act named all of the then existing treaties.[27] Over time, as new treaties were entered into by the Member States, the Act was amended to ensure that every relevant treaty which the UK signed would be given effect in this way.

Parliament also enacted the European Assembly Elections Act 1978 and European Parliamentary Elections Act 2002, which gave British citizens rights to vote in elections and to stand as candidates for the European Assembly and, later, the European Parliament. Significantly, these two Acts provided that no treaty that resulted in any increase in the powers of the European Assembly or Parliament could be ratified unless it had first been approved by an Act of Parliament.[28] The European Union (Amendment Act) 2008, which added the Treaty of Lisbon to the list of treaties in the ECA, went further. It provided that statutory approval would be required prior to ratification of any treaty which amended the TEU or the Treaty on the Functioning of the European Union by, in effect, altering the competences of the EU, or which altered the decision-making processes of the EU or its institutions so as to dilute the influence of individual Member States.[29] The European Union Act 2011 went further still. It placed a complex set of controls on the ratification of amending treaties and on the UK's approval of revisions to the treaties under the simplified revision procedure pursuant to Article 48(6) TEU. It required, in effect, that changes that would, among other things, increase the competences of the EU or result in a dilution in the influence of individual Member States would first have to be approved in a UK-wide referendum.[30]

Finally, the UK Parliament enacted the European Union Referendum Act 2015. This Act authorised the holding of the referendum that was held on 23 June 2016. However, it did not stipulate what the legal consequences of the

25 *Attorney-General for Canada* v *Attorney-General for Ontario* [1937] AC 326, 347 *per* Lord Atkin; *JH Rayner (Mincing Lane) Ltd* v *Department of Trade and Industry* [1990] 2 AC 418, 500 *per* Lord Oliver of Aylmerton (*JH Rayner (Mincing Lane) Ltd*). I say 'generally' here because there are ways in which the content of international treaties can enter into the principles of domestic law without specific enactment. For a discussion, see Sales and Clement, n 1 above; G. Cranwell, 'Treaties and Australian Law — Administrative Discretions, Statutes and the Common Law' (2001) 1 *Queensland University of Technology Law & Justice Journal* 49.

26 ECA, s 2(1). To be more precise, the sub-section states: '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, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.'

27 Certain ancillary treaties were also included by reference: ECA, s 1(1).

28 European Assembly Elections Act 1978, s 6; European Parliamentary Elections Act 2002, s 12.

29 This is the effect of the European Union (Amendment Act) 2008, s 5, as summarised in *Miller* n 2 above at [28].

30 This is the effect of the European Union Act 2011, ss 2-6, as summarised in *Miller* n 2 above at [29].

referendum result would be. What would happen after the referendum was left for political determination.

ESTABLISHING THE PREMISES

Given this statutory background, there were several hurdles that the Applicants had to overcome to establish their case. The first concerned their need to rebut Syllogism A. As far as Major Premise A is concerned, it is without doubt that the prerogative includes the power to conclude and withdraw from international treaties. As Lord Templeman bluntly put it in *JH Rayner (Mincing Lane) Ltd*: '[t]he Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty'.[31] The majority in the Supreme Court therefore readily accepted the validity of Major Premise A: that the Crown has the prerogative power to give notice under Article 50 *unless* this is abrogated or regulated expressly or impliedly by an Act of Parliament.[32] The further problem for the Applicants concerned Minor Premise A, which is focused on the question whether the ECA (or any other relevant statute) abrogated the Crown's power to give notice under Article 50. The ECA in no place explicitly addresses—let alone regulates or restricts—the prerogatives of the Crown as regards the EU treaties, and it is not easy to establish that the Act has this effect by necessary implication either. Much depends on whether one takes a stringent or liberal approach to the discernment of implications.[33] The High Court in *McCord* took a stringent approach when it adopted statements in *Morgan Grenfell* and *De Keyser* to the effect that a necessary implication is not merely a 'reasonable implication', but that the implication must 'necessarily follow ... from the express provisions of the statute' and that the statute must 'occupy the specific ground' and must empower the doing of 'the very thing' previously occupied and undertaken by prerogative.[34] While the ECA may be said to assume the existence of the EU treaties, it is much less clear that it *necessarily requires* the UK's continued adherence to them.[35]

31 *JH Rayner (Mincing Lane) Ltd* n 25 above, 476.

32 *Miller* n 2 above at [54]-[55], read with [85]-[86].

33 Australian law, for example, has tended to adopt a stringent approach in this context. See G. Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21 and B. B. Saunders, 'Democracy, Liberty and the Prerogative: Displacement of Inherent Executive Power by Statute' (2013) 41 *Federal Law Review* 363.

34 *McCord* (HC) n 4 above at [81]-[84], citing *R (Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax* [2002] 2 WLR 1299 at [45] *per* Lord Hobhouse and *De Keyser* n 10 above, 526 *per* Lord Dunedin, 539 *per* Lord Atkinson.

35 What is more, it was only the Acts of 1978, 2002, 2008 and 2011 that ever specifically addressed the exercise of the prerogative powers with respect to the UK's entry into EU-related treaties. However, these Acts were deliberately limited to controlling the UK's entry into treaties which had the effect of either altering the competences of the EU or diluting the influence of Member States within the EU. Thus, on the occasion when Parliament addressed its attention to the exercise of the prerogatives in this context, it chose not to place any restrictions on the power to give notice of a decision to withdraw from the EU under Article 50, even though that was one of the key features of the Treaty of Lisbon, to which the European Union (Amendment Act) 2008 gave effect.

The reasoning in *McCord* thus suggested that if Syllogism A were to govern the case a decision in favour of the Government was likely. In *Miller*, the Divisional Court avoided the force of this line of argument by insisting that more weight be given to the counter-principle that the Crown cannot use its prerogative powers to alter domestic law or nullify rights, which was to shift attention away from Syllogism A and towards Syllogism B.[36] Given the Divisional Court's decision in their favour, this gave the Applicants reason to frame their arguments before the Supreme Court in terms of Syllogism B in two respects: first, to establish that the major and minor premises of the syllogism were valid and, second, to establish that it, rather than Syllogism A, governed the case. But demonstrating the validity and priority of Syllogism B was not a simple matter either.

Certainly, the Government's attack on Major Premise B was not strong. It argued that the case law does not support a general principle that the prerogative cannot be used to vary the law of the land or deprive individuals of rights. It further argued that the cases had held, on the contrary, that the prerogative can be used to change domestic law and deprive individuals of rights. It is important to note, however, that the Government referred in its written submissions to the changing of *domestic law generally*,[37] whereas the Applicant's case depended on the more precise proposition that the prerogative cannot be used to defeat rights *created by statute*.[38] It is difficult to see how this narrower proposition does not follow from the declaration in the *Case of Proclamations* that the King cannot change 'any part of the common law, or statute law, or the customs of the realm',[39] or from the statement in *The Zamora* that, apart from delegated law-making power, the executive has no power to prescribe or alter the law administered by the courts.[40] The majority in the Supreme Court had little difficulty affirming the validity of Major Premise B,[41] and distinguishing situations where the exercise of the prerogative can affect legal rights without changing the law.[42]

The establishment of Minor Premise B1 was more difficult however. Here the Applicants had to show that the EU rights given domestic effect by ECA are rights enacted by Parliament. The problem was with the unusual way in which the Act gives domestic effect to EU law. The Act was enacted *after* Britain signed the Treaty of Accession through which it became a member of the EC but *before* Britain ratified it. This process recognised the capacity of the government to sign the treaty in exercise of the Crown's international prerogatives without parliamentary approval. The timing also recognised the need to postpone Britain's ratification of the treaty until after the Act came into force, to ensure that from the time of ratification Britain would be in

36 *Miller* (DC) n 3 above at [80]-[94].
37 *R (Miller)* v *Secretary of State for Exiting the European Union*: Appellant's Case at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, paras 54-60 (last accessed 20 April 2017).
38 Written Case for the Lead Claimant, n 9 above, para 2(3)(b).
39 *Case of Proclamations* n 13 above *per* Sir Edward Coke CJ.
40 *The Zamora* n 19 above, 90 *per* Lord Parker of Waddington. See also *JH Rayner (Mincing Lane) Ltd* n 25 above, 500 *per* Lord Oliver of Aylmerton.
41 *Miller* n 2 above at [43]-[46], [50].
42 *ibid* at [52]-[53].

compliance with its European obligations. This was achieved because the Act gave the required automatic and immediate domestic effect to the rights and duties created by the treaties or pursuant to them.

However, section 2(1) of the ECA does not enact rights in any straightforward sense. It rather assumes the existence of certain rights—rights 'created or arising by or under the Treaties'—and it provides that these 'shall be recognised and available in law, and be enforced'. And it refers to these rights as arising 'from time to time'.[43] Accordingly, it is never possible to know the content of the rights by reading the Act alone; indeed, it is not possible to know the content of all the rights even by reading the treaties specifically incorporated into the ECA by section 1(2). The content of the rights depends not only on the terms of the treaties, but also on measures created by European institutions pursuant to those treaties and the interpretation of those rights by European judicial institutions.[44] As such, the Act does not expressly identify and does not control the content of the rights to which it gives domestic effect. Are such rights 'enacted' by Parliament in the sense required by Major Premise B? Certainly not in the ordinary sense contemplated by the courts when they have articulated the principle underlying Major Premise B in the decided cases. Rather, as the majority acknowledged, the true 'sources' of the rights are the EU treaties, EU legislation and EU judicial interpretations.[45]

The unique way in which the ECA gives domestic effect to EU law thus militated against the Applicants in this important respect. To get around it, they had to stretch the principle so that it would embrace statutes 'recognising' rights created by supranational institutions external to the UK. But the problem was that these institutions exist because of treaties entered into on the international plane, in respect of which it is the executive head of state or head of government who ordinarily has authority to act for and bind the state that he or she represents.[46]

Viewed in this way—and bearing in mind the UK's 'dualist' approach to the relationship between international treaties and domestic law—are EU rights properly to be regarded as falling within the sphere of Parliament's control over domestic law, or are they properly within the sphere of the government's engagement in international affairs? If they are more in the nature of international rights, then their existence and their content would seem to depend on the latter rather than the former. If this is so, as Professor Finnis argued, EU law and EU rights would depend on two conditions for their existence: action by the government on the international plane and action by Parliament on the domestic plane.[47] On this view, it would seem to be within the jurisdiction of the government both to enter such treaties and to withdraw from them. This would not be any breach of the principle that the prerogative cannot be used

43 *ibid* at [76].
44 *ibid* at [61]-[62].
45 *ibid*.
46 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, Art 7(2)(a).
47 J. Finnis, 'Terminating Treaty-based UK Rights' *UK Constitutional Law Association* 26 October 2016. See also Lord Millett, 'Prerogative Power and Article 50 of the Lisbon Treaty' (2016) 7 *UK Supreme Court Yearbook* 190.

to abrogate domestic law because EU law is not domestic law; it is a special kind of international or, if you like, supranational law.

These were the problems with Minor Premise B1, and they proved formidable. For on close analysis it appears that the majority accepted that Minor Premise B1 could *not* be established. Echoing what they called the 'illuminating analysis' of Professor Finnis, they said that the ECA was only the 'conduit pipe' through which EU law is introduced into UK domestic law.[48] The EU institutions are the source of EU rights in UK law; it is they that create and abrogate the rights that apply domestically without the specific sanction of any UK institution; and accordingly the content of EU rights is exclusively a matter of EU law, not domestic law.[49] But if this is so, then Syllogism B is invalid and Syllogism A should be dispositive of the case. Such an analysis suggests that the really vital factor—the *source* that creates and determines the *content* of the rights—operates on the international plane, the dimension in which the prerogative normally engages. And, indeed, this line of argument, among other things, persuaded a minority of the Supreme Court to decide in favour of the Government.[50] In order to avoid this conclusion, the majority had to devise a way around it.

AVOIDING DUALISM

The majority avoided the difficulties posed by these problems with Syllogism B by circumventing the dualist account of the relationship between UK statutory law and EU treaty law relied upon by the Government. This is not to say that they rejected dualism; on the contrary, they expressly affirmed it.[51] Indeed, they said that dualism is the reason why the two fundamental propositions at stake in the case are compatible. It explains why there is no contradiction between the powers of the government and the powers of Parliament in relation to the UK's legal relationship to the EU: the two powers operate in different spheres, one international, the other domestic.[52] However, given this background, the problem became this: from the perspective of which sphere of operation—domestic or international—is the act of giving notice under Article 50 to be understood? Given that the act of giving notice is (a) authorised by a provision contained in an international treaty and (b) of a kind that is ordinarily within the prerogatives of the Crown, dualism seems to lead to the conclusion that it is to be understood from the perspective of the UK's relation to the international sphere, the sphere in which the government's international prerogatives operate.

48 *Miller* n 2 above at [65]. Professor Finnis has, in fact, disclaimed the metaphor: J. Finnis, 'The Miller Majority: Reliant on European Perspectives and Counsel's Failings' *Policy Exchange: Judicial Power Project* 25 January 2017, para 6; J. Finnis, 'Brexit and the Balance of Our Constitution' *Policy Exchange: Judicial Power Project* 2 December 2016, 22.

49 *Miller* n 2 above at [61]-[62].

50 *ibid* at [216], [218] *per* Lord Reed, at [256]-[257] *per* Lord Carnwath, at [277]-[278] *per* Lord Hughes; see also [77] *per* the majority.

51 However, the majority did call it 'the *so-called* dualist theory': *ibid* at [55] (emphasis added), suggesting some degree of caution about it.

52 *ibid* at [56].

But if that is so, then Syllogism A seems to provide the relevant principle: the government *can* through the exercise of the prerogative give notice under Article 50.

So the majority had to find some way around this to conclude, to the contrary, that parliamentary approval was required. They did this by picking up on the Applicants' and Interveners' submissions on the constitutionally 'unprecedented' and 'exceptional' nature of the system that the ECA inaugurated.[53] In particular, they emphasised that the EU treaties and institutions are not only the source of the rights to which the ECA gives domestic effect, but that through that Act, the EU treaties and EU institutions themselves became 'direct sources of UK law',[54] indeed 'independent and overriding source[s] of domestic law',[55] which 'take ... precedence over all domestic sources of UK law, including statutes'.[56]

The constitutional novelty of the scheme introduced by the ECA did not, it needs to be emphasised, transform the Act into some kind of 'written constitution' or 'higher law' that cannot be amended by the legislature. The majority insisted that the basic constitutional principle of parliamentary sovereignty was not disturbed: the ECA could still be amended or repealed by Parliament.[57] Rather, the Act has a 'constitutional character,'[58] they said, because the 'fundamental' reality of the new system inaugurated by the Act is that it introduces a new source of law into UK domestic law that takes precedence over domestic law, including parliamentary statutes, even those enacted in the future.[59] The constitutional novelty of the scheme was that it took rules that would 'normally be incompatible with UK constitutional principles' and made them 'part of our constitutional arrangements'.[60]

This move of bringing EU law-making *into* the framework of UK law was important. It transferred the question from the domain of international law into the domain of domestic law—the domain in which parliamentary sovereignty, rather than the international prerogatives of the Crown, normally operates. On this basis the majority insisted that, although the content of EU law is exclusively determined by EU law-making and law-interpreting institutions,[61] this 'new

53 *ibid* at [60], [68], citing the famous decisions of the European Court of Justice, *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* n 24 above, 12 and *Costa* v *ENEL* n 24 above, 593. The constitutional significance of the ECA was also emphasised by several commentators. See, for example, J. Rivers, 'Brexit and Parliament: Doubting John Finnis's Dualism' *University of Bristol Law School Blog*, 16 November 2016. Contrast, however, J. King and N. Barber, 'In Defence of Miller' *UK Constitutional Law Blog*, 22 November 2016.

54 *Miller* n 2 above at [61].

55 *ibid* at [65], [68], [80]. 'The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law': *ibid* at [90].

56 *ibid* at [60]. See also at [68].

57 *ibid* at [61].

58 *ibid* at [67].

59 *ibid* at [61], [66], citing section 2(4) of the Act and *Factortame Ltd (No 2)* [1991] 1 AC 603 and *Thoburn* n 24 above at [37]-[47] *per* Laws LJ.

60 *Miller* n 2 above at [68].

61 Note, however, the dictum in *R (on the application of HS2 Action Alliance Limited)* v *Secretary of State for Transport* [2014] UKSC 3 at [207] *per* Lord Neuberger and Lord Mance, with whom

constitutional process for making law in the United Kingdom' created by the ECA was to be understood, not from the perspective of the UK's relationship to EU law or international law, but from the perspective of the domestic domain of UK law.[62] This was very clever. Reframing it this way, the majority were able to acknowledge that the operation of EU law in the UK is dependent on two conditions: the UK's adherence to the EU treaties and implementation of those treaties by UK statute.[63] But by characterising the question as 'constitutional' in this special sense, they were able to conclude that the giving of notice under Article 50, although an act of the prerogative operating in the international domain, fell to be determined by reference to the sphere of domestic law, where the principle of parliamentary sovereignty prevails.

According to the majority, this entailed the consequence that the prerogative could not be used to make 'fundamental change[s]' to the constitutional arrangements of the United Kingdom without parliamentary approval.[64] It also enabled the majority to explain why Major Premise A was inapplicable to the case at hand. On this view, the EU treaties 'not only concern international relations' but they 'are a source of domestic law ... and domestic rights'.[65] As a result they have become part of domestic law, and have transformed that domestic law by integrating it with the EU system of law. And because the EU treaties have this organic relationship to domestic law—because they are now constituent elements of the UK constitution—the UK cannot withdraw from them simply by an exercise of the prerogative. Parliamentary authorisation is required for far-reaching constitutional change of this kind.[66]

Viewed in this way, what the Government needed to show was not only that no statute had (negatively) removed or fettered the prerogative, but also that a statute had (positively) conferred it.[67] But as the ECA never addressed the question, it was nigh impossible to show the latter to be the case.[68] Indeed, applying the principle of 'legality', the majority said that the statute would only be interpreted to have the effect of enabling the prerogative to be used to abrogate EU rights if this was expressed in clear and unambiguous terms.[69]

Lady Hale, Lord Kerr, Lord Sumption, Lord Reed and Lord Carnwath agreed, that 'it is for United Kingdom law and courts to determine' whether there might be 'fundamental principles ... contained in ... constitutional instruments or recognised at common law ... of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation'.

62 *Miller* n 2 above at [62].

63 *ibid* at [64]-[65].

64 *ibid* at [78], [81]-[82]; see also [67]. As the majority later explained, even though EU rights passing into UK law are 'contingent' on decisions taken by EU institutions, the continued existence of the 'conduit pipe' through which those rights pass is not itself contingent. It is established by Parliament and can only be altered by Parliament: *ibid* at [84]. In this way, Syllogism B gave way to Syllogism C.

65 *ibid* at [86].

66 *ibid*.

67 *ibid*.

68 The majority considered, indeed, that the opposite was the case: that the better interpretation of the Act was that it positively denied that ministers had the power to withdraw from the EU treaties: *ibid* at [88].

69 *ibid* at [87]. This was to apply a test that was *even more stringent* than the 'express or necessarily implied' test that applied to the abrogation of the prerogative under Syllogism A.

The silence of the ECA on the question of the prerogative was thus turned against the Government, and decisively so.

AN ALTERNATIVE SYLLOGISM

In effect, the majority proposed a new syllogism for the resolution of the case, that looked something like this:

Syllogism C

Major Premise C: The Crown cannot exercise its prerogative powers to change the constitution of the United Kingdom, such as by abrogating sources of UK domestic law created by Act of Parliament, unless this is authorised by Act of Parliament.

Minor Premise C1: The European Communities Act makes provision for the constitution of the United Kingdom by establishing the EU law-making institutions as a new source of law in UK domestic law.

Minor Premise C2: An exercise by the Crown of the prerogative power to give notice under Article 50 would change the constitution of the United Kingdom by abrogating a source of domestic law created by Act of Parliament.

Minor Premise C3: No Act of Parliament authorises the Crown to exercise its prerogative power to give notice under Article 50.

Conclusion C: The Crown cannot exercise its prerogative powers to give notice under Article 50 and change the constitution of the United Kingdom by abrogating a source of domestic law created by Act of Parliament without authorisation by Act of Parliament.

This was a novel line of reasoning. It went further than the Divisional Court had done and was more subtle than the arguments advanced by the Applicants and various Interveners. Certainly, the Divisional Court and Applicants had drawn attention to the 'constitutional' character of the scheme created by the ECA.[70] However, the basic structure and content of Syllogism B, with its focus on 'rights' and the alteration of the 'law', and the need to rebut Syllogism A, remained central to their arguments.[71] Indeed, in support of Syllogism

70 *Miller* (DC) n 3 above at [43]-[44], [87]-[88]; Written Case for the Lead Claimant n 9 above, paras 2(1), 2(3)(b), 4-6, 8-9, 41, 43(1); *R (Miller)* v *Secretary of State for Exiting the European Union*: Written Case of the Second Respondent at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, paras 2(1), 7, 31, 56(1) (last accessed 20 April 2017).

71 *Miller* (DC) *ibid* at [11]-[12], [14], [32]-[35], passim; Written Case for the Lead Claimant, *ibid*, paras 2(1)-(3), 9, 15-18, 21-33, 41, 43; Written Case of the Second Respondent, n 70 above, paras 2(1), 7, 10, 14, 31, 35, 42, 47, 56(1). This is not to suggest that the Applicants did not recognise the need to overcome the implications of dualism (see para 2(4)(a)) by focusing on the exceptional nature of the ECA and the EU (see Written Case for the Lead Claimant, *ibid*, paras 4-6, 8).

B one of the Applicants maintained that the '*only* source' of those rights was the ECA itself, not the EU treaties and institutions—which was, on its face, a direct contradiction of Minor Premise C1.[72] It is true that the Divisional Court had recognised, and the Lord Advocate for Scotland argued, that the constitutional significance of the ECA was that it established the EU treaties and institutions as new sources of law involving new law-making processes.[73] However, in the written submissions of the Lord Advocate this was intertwined, not only with Syllogism B,[74] but also with the claim that the *sovereignty* of the British Parliament had itself been qualified as a result of constitutional statutes such as the ECA and the Scotland Act 1998.[75] As Lord Reed pointed out in his dissenting judgment, this amounted to the claim that the UK's withdrawal from the EU would alter the rule of recognition within the UK,[76] a proposition that none of their Lordships were willing to accept.[77] The further task of the majority, therefore, was to find a way in which it could be affirmed that the ECA had created a new source of law (in terms of Minor Premise C1) without implying that the basic principle of parliamentary sovereignty had itself been altered in some fundamental respect.

A crucial turning point occurred during the hearings when Lord Sumption directed a series of leading questions to James Eadie QC, lead counsel for the Government, and later to Lord Pannick QC, lead counsel for the first Applicant (Miller). The thrust of Lord Sumption's questioning was to propose that the main issue in the case was not whether there was a prerogative power to terminate treaties in a way that would nullify statutory rights (ie, Syllogism B),[78] but whether withdrawal from the EU would 'alter the current constitutional rules of the United Kingdom as to what the sources of our law are by removing one of those sources' (ie, Syllogism C).[79] Much then turned on Mr Eadie's attempts to respond to this new line of argument and Lord Pannick's

72 Written Case of the Second Respondent, n 70 above, para 37. This was necessary to rebut Syllogism A and support Syllogism B, but it contradicted Syllogism C, which depends on the proposition that the EU treaties or EU institutions became new sources of law in themselves.

73 *Miller* (DC) n 3 above at [34] and [37]; *R (Miller)* v *Secretary of State for Exiting the European Union*: Written Case of Lord Advocate at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, paras 1, 27, 64 (last accessed 20 April 2017)). The written submissions of the Lord Advocate even stated (in passing) that EU legislative procedures were '*incorporated into* the UK's constitutional structures': at para 64 (emphasis added), citing *Costa* v *ENEL* n 24 above.

74 Written Case of Lord Advocate, *ibid* paras 1, 27(4), 35(4), 42, 57-62, 67 and 87(2).

75 *ibid,* para 30, citing *R (Jackson)* v *Attorney General* [2006] 1 AC 262 at [104] *per* Lord Hope. The constitutional claims of the Lord Advocate were also intertwined with arguments based on Syllogism B (see [35]) and the wider concern of the Lord Advocate to argue that withdrawal from the EU (on the basis of an authorising UK statute) would trigger the need, as a matter of convention, for a legislative consent motion to be passed by the Scottish Parliament (*ibid* at [81] and [85]-[86]).

76 *Miller* n 2 above at [173] and [223] *per* Lord Reed.

77 *ibid* at [60] *per* the majority and at [224]-[227] *per* Lord Reed, with whom Lords Carnwath and Hughes agreed.

78 Lord Pannick QC began his oral submissions with a straightforward invocation of Major Premise B: Transcript of Proceeding, 6 December 2016 at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, 143 (last accessed 20 April 2017).

79 *ibid,* 40 (Lord Sumption and Mr Eadie QC), 144 (Lord Sumption and Lord Pannick QC); see also 55 (Lord Hodge).

adept acceptance of it,[80] as other judges—Lord Kerr, Lord Carnwath and Lord Mance, as well as Lord Sumption again—repeated the same point.[81] Mr Eadie had to convince the Court, among other things, that the real source—the real locus of legislative power—remained Parliament.[82] He was able to convince Lords Reed, Carnwath and Hughes, but not the other judges.

Notably, Mr Eadie's response to this line of argument was not to deny the validity of Major Premise C: that the Crown cannot alter the constitutional fundamentals of UK law. It was, rather, to deny Minor Premise C1: that the ECA changed the constitution by establishing the EU law-making institutions as a new source of domestic law. He did this by insisting that Parliament had never conferred 'legislative competence' in the full sense of the word on any external institutions.[83] In his dissenting judgment, Lord Reed built on this line of thinking. In a crucial paragraph his Lordship stated that

> The UK's entry into the EU did not . . . alter its rule of recognition, and neither would its withdrawal. That is because EU law is not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law, but depends on the ultimate rule of recognition.[84]

For Lord Reed, the validity of Syllogism C, like Syllogism B, turned ultimately on the meaning and effect of the ECA.[85] High-sounding references to the constitutional significance of the UK's membership of the EU were not to the point. What mattered, on his approach, was a careful process of statutory interpretation. The ECA had not created a new source of domestic law (contrary to Minor Premise C1); rather, it had given domestic effect to EU law in a manner that was 'inherently conditional' on the UK's continued membership of the EU; and in no place did it impose any requirement or manifest any intention concerning the UK's continuing membership of the EU (in terms of Minor Premise A). It therefore followed for Lord Reed that Ministers were entitled to give notice under Article 50 in exercise of the international prerogatives, without any need for authorisation by an Act of Parliament.[86]

80 Lord Pannick noted that Lord Sumption had already put the point to Mr Eadie and reframed his submissions accordingly: *ibid*, 147-148, 169, 178-9, 183, 187; Transcript of Proceeding, 7 December 2016 at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, 26 (last accessed 20 April 2017). See, similarly, oral submissions of the Lord Advocate and Ms Mountfield: *ibid,* 144; Transcript of Proceeding, 8 December 2016 at https://www.supremecourt.uk/news/article-50-brexit-appeal.html, 65-70, 84 (last accessed 20 April 2017), although these submissions were still tied up with Syllogism B. On the other hand, lead counsel for the second Applicant (Santos), Dominic Chambers QC, continued to press the Syllogism B argument and insisted that the source of the rights was the ECA: Transcript of Proceeding, 7 December 2016, 65, 88-90.

81 Transcript of Proceeding, 6 December 2016, n 78 above, 145 (Lord Kerr), 172 (Lord Carnwath). Lord Carnwath ultimately rejected the argument, observing that 'lack of precedent is not a reason for inventing new principles': *Miller* (SC) at [247]; Transcript of Proceeding, 8 December 2016, n 80 above, 160-161 (Lord Mance), 168 (Lord Sumption).

82 Transcript of Proceeding, 8 December 2016, n 80 above, 162.

83 *ibid*.

84 *Miller* n 2 above at [224].

85 *ibid* at [179], [217] and [229].

86 *ibid* at [177].

CONCLUSIONS

When an international, supranational or federal system of governance is formed, when it is amended, and when a state withdraws from membership, much depends on the perspective from which the act of formation, the act of amendment and the act of withdrawal is understood. Are those acts of formation, amendment and withdrawal to be regulated from the vantage point of the legal system of each member state or from the perspective of the international, supranational or federal system as a whole? This is a vital question because acts of amendment and withdrawal, like acts of formation, raise questions about the location of the constituent authority, or rule of recognition, on which the entire system of law rests.[87] Countries within the British Commonwealth that have multi-level systems of government, such as Australia, Canada, India, Malaysia and India, substantiate subtly different configurations of constituent authority within their constitutional systems.[88] The UK's membership of the EU is no exception. Although Article 50 TEU pointedly says that each member state determines whether it intends to withdraw from the EU 'in accordance with its own constitution', *Miller* demonstrates how complicated the identification of those constitutional requirements can be.

On a traditional 'dualist' view, the UK's membership of international organisations depends on two distinct acts: (a) the signature and ratification of the relevant treaty on the international plane and (b) the implementation of any domestically-applicable international obligations by the enactment of domestic legislation. The first is an act of government ministers in exercise of the prerogatives of the Crown; the second is an act of Parliament in exercise of its legislative competences. Because Parliament is sovereign, its statutes bind the Crown and control the exercise of the prerogatives (Major Premise A) and the prerogative cannot be used to abrogate rights or laws enacted by Parliament (Major Premise B). On this view, the question in *Miller* became whether any statute abrogated or regulated the prerogative power to give notice under Article 50 (Minor Premise A) or whether the giving of notice would change the law or abrogate rights enacted by Parliament (Minor Premises B1 and B2). However, in view of the difficulties the Applicants faced in establishing their case in respect of these minor premises, a majority of the Supreme Court, seizing on submissions that the ECA had established the EU treaties and EU law-making institutions as new sources of law within UK domestic law, developed what was in effect an alternative argument, Syllogism C—a substitute which appeared to avoid the problems the Applicants faced in establishing Syllogism B. In particular, this alternative syllogism avoided the ordinary implications of dualism. It suggested how EU rights could simultaneously be created by and derive their (variable) content from EU treaties and EU institutions operating on the international plane (where the prerogative normally operates) and yet be fundamental aspects of UK domestic law (over which

87 N. Aroney, 'Constituent Power and the Constituent States: Towards a Theory of the Amendment of Federal Constitutions' (2017) 17 *Jus Politicum: Revue de droit politique* 5.

88 N. Aroney, 'The Formation and Amendment of Federal Constitutions in a Westminster-Derived Context' (2017) 15 *International Journal of Constitutional Law* (forthcoming).

Parliament has ultimate control). The majority got to this conclusion by saying, in effect, that the ECA integrated the UK into a unique supranational constitutional system in which the barriers between domestic and international law were, to an important extent, broken down. As the majority put it: 'a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law'.[89]

As a consequence, while the UK constitution was not changed at the very deepest level, where parliamentary sovereignty dwells, it was changed at the next level up, where the relationships between the Crown and Parliament and between the UK and other countries are regulated. That is the intriguing paradox of the Supreme Court's decision in *Miller*. Here it may be tempting to think that it is the special nature of the EU as a kind of 'autonomous legal system'[90] that somehow underwrites the validity of Minor Premise C1. However, it is not necessary to think this; and indeed, this would run flatly counter to the role played by the doctrine of parliamentary sovereignty in the majority's judgment. For, notwithstanding the many times the majority said the new system inaugurated by the ECA was 'constitutional', it seems this was little more than a high-sounding way of saying that this new source of law embedded in UK domestic law was of such significance that it cannot be abrogated by an exercise of the international prerogatives.[91] To get to the majority's desired conclusion it was enough to say, in terms of Minor Premise C1, that the EU treaties and EU law-making processes were made domestic, that they were made parts of the UK legal system. For this way of looking at it transformed the question so that it was no longer about the UK's relation to the international legal order (and therefore concerned the domain in which the international prerogatives operate), but was rather about sources of law within the domestic legal system (and therefore concerned the sphere in which Parliament, not the Crown, determines the content of the law). As the powerful dissenting judgment of Lord Reed demonstrated, this did not necessarily resolve the issue, for the case still turned on the meaning and effect of the ECA, but it did reorient the way UK law and EU law were understood in fundamental ways. For while the majority affirmed that the 'changes in domestic rights' that would occur upon the withdrawal of the UK from the EU represented 'another, albeit related, ground' for justifying their conclusion, this was only because those rights were 'acquired through' the new source of law established by the ECA.[92] Properly understood, therefore, Syllogism B could not stand on its own as an independent ground of the decision; the real work was done by Syllogism C.

89 *Miller* n 2 above at [90].

90 *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, ECLI:EU:C:2008:461 at [316]; see also [4], [282] and [317].

91 The more specific proposition articulated by Laws LJ in *Thoburn* n 24 above at [60]-[67], that the ECA is a constitutional statute in the particular sense that it cannot be impliedly repealed, is strictly irrelevant to the question whether the ECA established a new source of law. For the statutory establishment of such a source of law might or might not be subject to implied repeal; either way, it would be still be a source of law, the only difference being whether it was an 'overriding' source of law: cf *Miller* n 2 above at [65], [68] and [80].

92 *Miller* n 2 above at [83].

So what conclusions can we draw from all this? The main point is that very complex and fascinating issues arise when special international organisations, like the EU, are brought into existence. Conflicts emerge over the meaning and interpretation of the instruments ('treaties' or 'constitutions') that establish the arrangement, and deep questions arise about which system of law, and from which institutional perspective, judgments are to be made and actions are to be taken. Article 50 shows that the EU treaties not only recognise the unilateral right of each member state to withdraw from the Union, but that the legal processes by which any such decision to withdraw is determined is a question for the domestic constitutional law of the Member State and not the constitutional law of the EU. However, the majority's decision in *Miller* turned this on its head in subtle ways. In their reasoning, when the UK enacted the ECA it brought EU law into UK domestic law, not only at the level of the specific rules and remedies of EU law, but at a constitutional level as well. It created a new source of domestic law, and this new source of law could only be abrogated by force of a statute enacted by the British Parliament. Thus, while the case was initially framed by the parties and commentators in terms of a contest between competing Syllogisms A and B, it was ultimately Syllogism C that won the day.