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Miller I

[2017] UKSC 5

What happens when historic powers clashes with modern democracy?

By Joshua Gatapia

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Following the **Brexit** referendum in 2016, the Executive attempted a departure from the **European Union** through the **Royal Prerogative**[1] rather than through Parliamentary consultation followed by a statute. This sparked the pivotal debate regarding the legality of such an action.

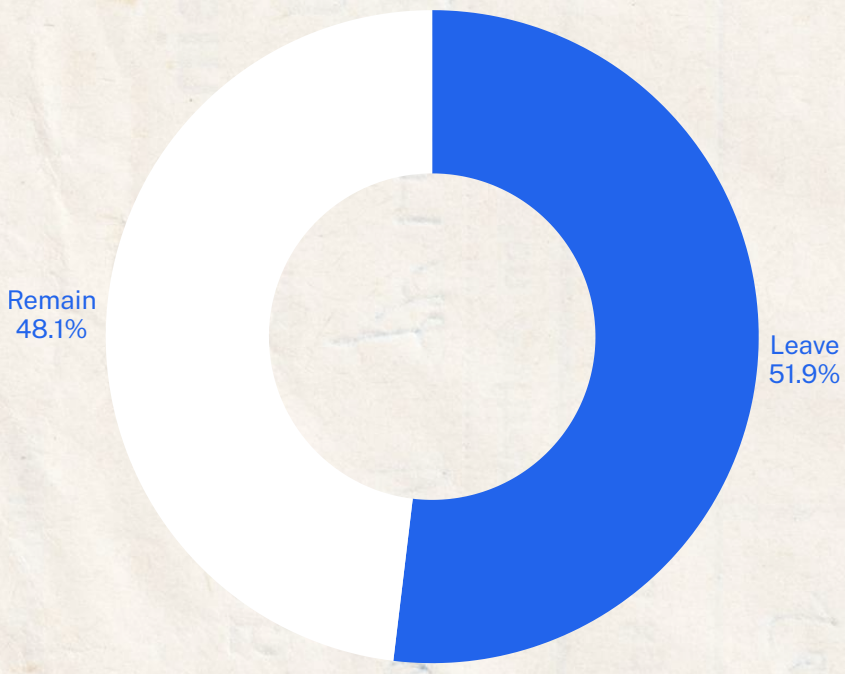
This forced the Judiciary and Parliament to refer to the conventions, regarding (1) the Royal Prerogative vs Parliamentary Sovereignty, (2) the Royal Prerogative vs Devolution, and the Royal Prerogative vs the Rule of Law.



1 - residual historic powers vested in the Crown

2016

IN JUNE, THE UK VOTED BY 51.9% TO LEAVE THE EU.



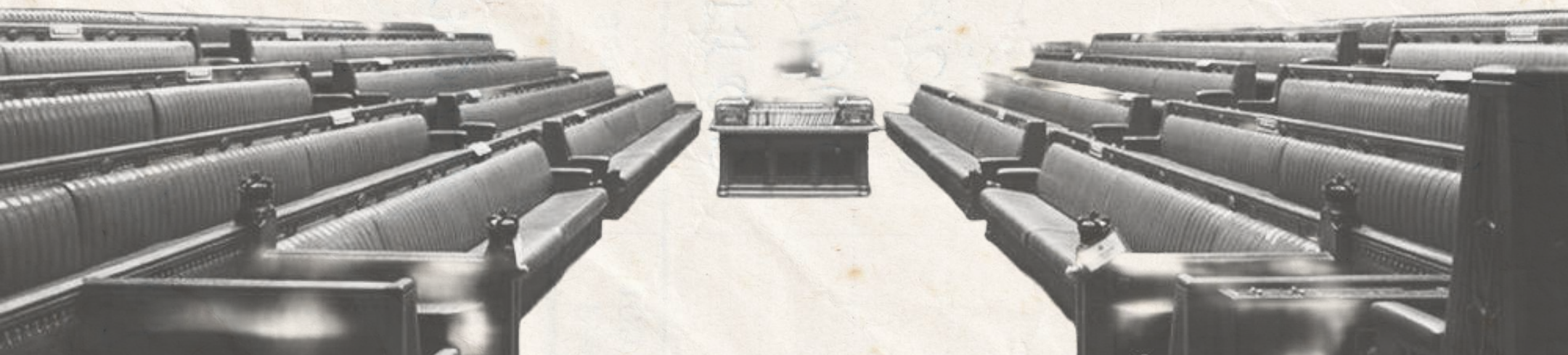
The Executive claimed it had unilateral authority under the *Royal Prerogative*, which includes powers concerning international relations and the making and withdrawal from treaties, arguing that they could notify the EU of the UK's intention to withdraw under Article 50 Treaty of European Union without prior parliamentary authorisation.

There's just one problem –

THE TEU GAVE BRITISH CITIZENS CERTAIN RIGHTS WITHIN THE EU.

If the government were to suddenly exit from the EU using these powers, it would affect domestic law and rob British citizens of these rights recognised by Parliament through the European Conventions Act 1972 (ECA).

Furthermore, this move would undermine both Democracy and Parliamentary Sovereignty, as Parliament would be denied the chance to vote on the matter.



GINA MILLER

was an activist who regularly challenged institutional financial transparency. She leveraged her wealth, experience, and public platform to launch a judicial review that escalated to the Supreme Court.

This legal issue raised a few fundamental questions on the UK's constitution:

Can the Executive use Royal Prerogative powers to withdraw from the EU if doing so strips UK citizens of their statutory rights? and does the Sewell Convention constrain Parliament to require consent from the devolved legislatures to leave the EU?



HELD

The Supreme Court held that Royal Prerogative powers *could not* be used to trigger Article 50 of the TEU and thereby withdraw from the EU.

The Court listed out a number of reasons for this decision:



ISSUE	MAJORITY (8-3)	DISSENTING
STATUTORY RIGHTS AND THE SCALE OF THEIR IMPACT IF CHANGED	The legal significance of the change would be too great. An explicit legislation must be written to carry it out.	Lord Reed contended that there was no material change in the constitution, but rather only the preconditions of it. He argued that the ECA was just a 'conduit'. So effectively, an exercise in the RP *would* be valid.
	UNANIMOUS (11-0)	
DEVOLUTION	Devolved institutions derive their legislative authority from Westminster. This being the case, the devolved legislatures cannot pass a statute apart from the will of Parliament. Thus, International treaty relations and the ECA are kept exclusively to the jurisdiction of Parliament.	
SEWEL CONVENTION	The Supreme Court withdrew from involving themselves in a political sphere and concluded that issues on the matter, (e.g. what is considered 'normal') are non-justiciable.	

RULE OF LAW

THE PRINCIPLE OF LEGALITY

demands an express, written law that allows the Executive to trigger Article 50 of the TEU.

By reasoning that citizens' rights **'cannot be overridden by general or ambiguous statutory words'**[2], they protect the procedural integrity of the law and public's rights, ensuring that the principle reinforces the constitutional presumption that fundamental rights require clear parliamentary language before they can be restricted.

However, it may appear that the Judiciary overstepped the boundaries of the Rule of Law and Separation of Powers by retroactively requiring Parliamentary authorisation that was not specified in the ECA 1972. This might be viewed as the courts exceeding their powers and taking up the roles of the Legislative in the matter.

It is also arguable that the courts simply applied the Rule of Law and Separation of Powers by reasserting Parliamentary Sovereignty over the Royal Prerogative, ensuring Ministers could not unilaterally alter domestic statutory rights.

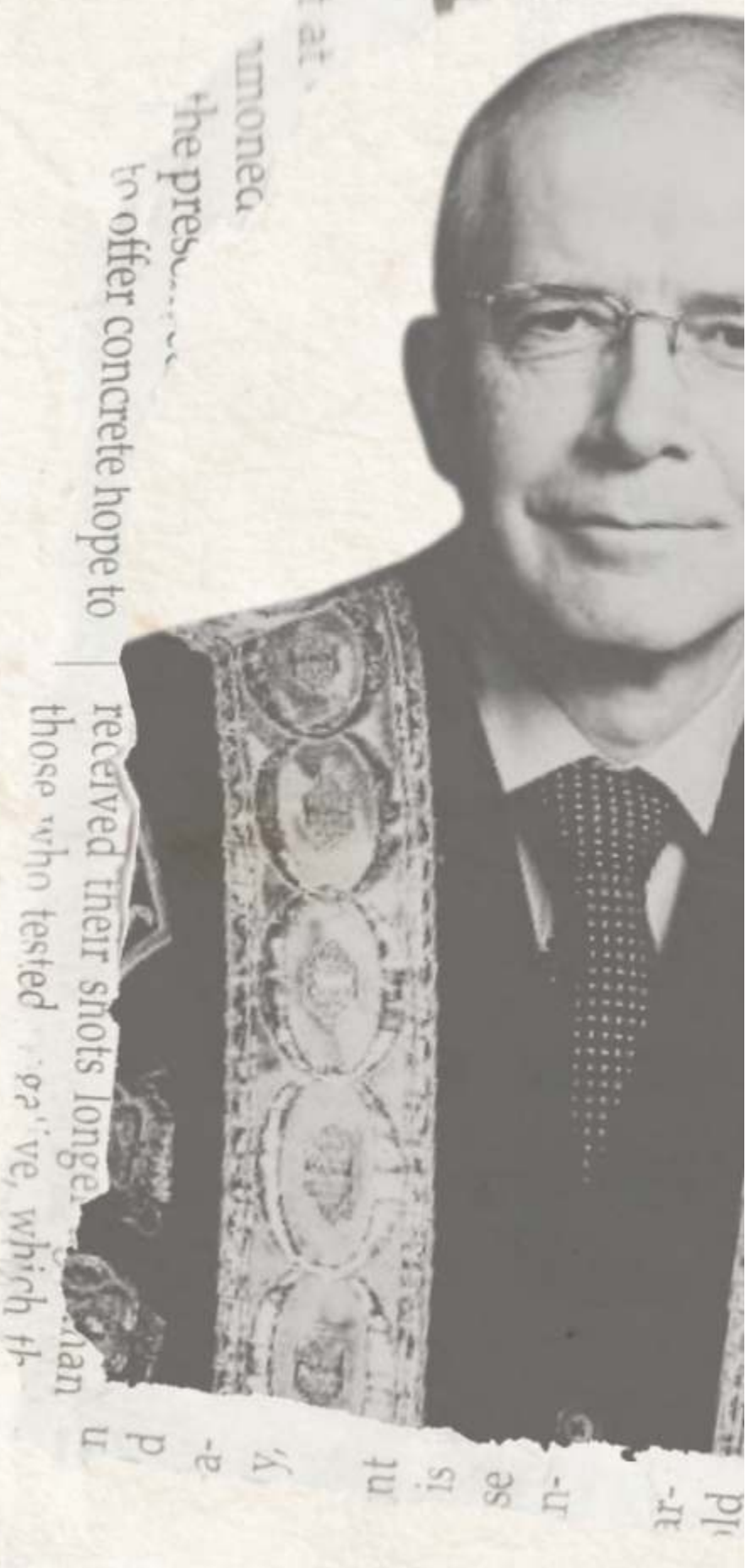
[2] *R v Home Secretary, ex parte Simms* [1999] UKHL 33; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (prerogative is placed in abeyance when Parliament legislates on the same field); *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 AC 513 (prerogative cannot be used to frustrate or render redundant a statutory scheme)

CRITICISM

1 The rejection of Lord Reed's 'conduit' interpretation of the ECA seems incoherent with the UK's dualist system.

The majority claimed that EU law was an 'independent and overriding source' of domestic law,

but, maintained that it depended on the ECA for its effect.





This foists a paradox in the majority's reasoning, and seemingly undermines their own argument.

Under classic dualism, where Parliament remains sovereign and the UK's **rule of recognition** remains unchanged, international law cannot be truly 'independent.'

"This paradox... seemingly undermines their own argument

Its authority in domestic courts depend mainly on the statute that incorporated it.

2 The reasoning relied on the scale of constitutional change but lacks a clear legal measurement.

The Court did not define the threshold of how large a change must be for the court to intervene.

Without clear guidelines for future cases, this judgement leaves the Court perplexed as to how to apply this reasoning for future cases.





Conversely, this has had the adverse effect of being vulnerable to criticisms arguing that the ruling was more akin to an ad hoc decision, influenced through politics rather than an objective deduction and application of pure constitutional law.

“[The decision’s]... influenced through politics rather than an objective deduction and application of pure constitutional law.

Nevertheless, this case has still established itself as one of the most influential cases in modern UK history.

The is a firm example that the Royal Prerogative cannot be used to alter domestic laws or frustrate rights created by Parliament. If the Executive wants to exercise prerogative powers resulting in a change, parliamentary legislation must be given.

This was later developed in Miller II [2019], establishing that the Royal Prerogative cannot be deployed to frustrate either substantive statutory rights or parliamentary accountability.

Cases

R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5

Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508

R v Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513

R v Home Secretary, ex parte Simms [1999] UKHL 33

Legislation

European Communities Act 1972

Treaty on European Union

Scotland Act 1998

Secondary Sources

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Elliott M, 'Analysis: The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (Public Law for Everyone, 25 January 2017)

Dindjer H, 'Sources of Law and Fundamental Constitutional Change' (UK Constitutional Law Blog, 27 January 2017)