**The Rule of Recognition and Sources of Law in *Miller***

Asif Hameed[[1]](#footnote-1)\*

The Supreme Court’s judgment in *Miller* renews attention in the sources of law, particularly treaty-based sources.[[2]](#footnote-2) The Court held by a majority of eight to three that the Government was not permitted to use the foreign affairs prerogative to notify the European Council of its intention to withdraw from the EU under Article 50(2) TEU without authorisation from an Act of Parliament. In response the European Union (Notification of Withdrawal) Act 2017 was enacted.[[3]](#footnote-3)

The majority’s reasoning has been criticised, including its twin claims that EU law is a direct, independent and overriding source of law and that UK membership of the EU did not alter the UK’s rule of recognition. I will begin by arguing that these twin claims are defensible. At the same time, *Miller* does leave unresolved important questions of constitutional law – in particular, what the precedential significance of the majority’s reasoning might be for *other* treaty-based sources of law. Is *Miller* a one-off case, not to be repeated again in our lifetimes, or might it have implications for other treaty-based sources that are given effect under domestic legislation? The paper’s second aim is to explore this question, and also to offer proposals to address some key uncertainties that remain.

**I. The majority’s reasoning about sources of law**

The majority held that “in light of the terms and effect of the [European Communities Act 1972, hereafter the ECA] … the prerogative could not be invoked by ministers to justify giving Notice: ministers require the authority of primary legislation”.[[4]](#footnote-4) Central to the majority’s reasoning was the view that in passing the ECA Parliament had established a new source of law. According to s. 2(1):

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 …

EU law’s status as a source of law was a running theme. The majority stated that under the ECA “EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes”.[[5]](#footnote-5) It also stated that “the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law”,[[6]](#footnote-6) that the ECA established EU law as an “independent and overriding source of domestic law”,[[7]](#footnote-7) and that “a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts”.[[8]](#footnote-8)

 In light of this, the majority held that the Government could not use the prerogative to withdraw from the EU and thereby “cut off” this source of law without prior authorisation from an Act of Parliament.[[9]](#footnote-9) There was novelty to this reasoning.[[10]](#footnote-10) It was not only that legal rights derived from EU law would be nullified. EU law as a source of law would be impermissibly extinguished, representing “a change which is different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law”.[[11]](#footnote-11) The majority did not accept that this change could be achieved “by … ministerial action alone”.[[12]](#footnote-12)

 At the same time the majority expressly denied that UK membership of the EU changed the UK’s rule of recognition: “the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal”.[[13]](#footnote-13)

**II. Defending the majority’s reasoning about the sources of law**

The majority’s reasoning has come under attack. Much of the debate has examined whether the ECA was properly construed, but since those issues have been well ventilated I will leave them to one side.[[14]](#footnote-14) In this section I wish specifically to address the majority’s reasoning about the sources of law and the rule of recognition. These aspects of its reasoning have faced sustained criticism, including from those who are sympathetic to other parts of the judgment. Can we come to the majority’s defence?

I should first expand on what the criticisms are. Lord Reed offered a robust dissent. He agreed with the majority that membership of the EU did not alter the rule of recognition but rejected the majority’s claim that EU law was an “independent source of law”.[[15]](#footnote-15) Rather, EU law depended “for its effect … on the 1972 Act”,[[16]](#footnote-16) and EU membership “has not altered any fundamental constitutional principle in respect of the identification of sources of law”.[[17]](#footnote-17) Consequently, Lord Reed denied that “for EU law to cease to have effect in our domestic law would be a major change in the UK’s constitution”.[[18]](#footnote-18) His view was that “Parliament has created a scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be”.[[19]](#footnote-19)

Writers have also targeted these twin claims that EU law is established as a source of law and that membership of the EU has not changed the UK’s rule of recognition. How can both claims be true if the rule of recognition identifies the system’s legal sources? Thus, Mark Elliott suggests that the majority’s reasoning “fails to provide a coherent intellectual basis” for its decision.[[20]](#footnote-20) This is picked up by Paul Craig who also disagrees with the majority’s reasoning: “there is, as Mark Elliott has noted, a tension between regarding EU law as a new source of law and yet rejecting the contention that the rule of recognition has been altered”.[[21]](#footnote-21) Similar criticisms have been enunciated elsewhere,[[22]](#footnote-22) and if correct they eliminate a central plank of the majority’s reasoning.

These criticisms – that the majority’s reasoning is theoretically unsound – do not hit their mark, however. It is possible to provide an account of the relation between the rule of recognition and the sources of law that dissolves the criticisms.

H.L.A. Hart’s analysis of the rule of recognition mainly focuses on an *ultimate* rule of recognition identifying *fundamental* sources of law within a legal system.[[23]](#footnote-23) These are fundamental sources because, in being identified by the ultimate rule of recognition, they “do not rest on any further … basis”.[[24]](#footnote-24) As these remarks already suggest, a legal system may also recognise non-fundamental sources of law – i.e. sources of law that do rest on a further legal footing such as a statute. The matter is well established in the literature.[[25]](#footnote-25) Non-fundamental sources may be called *derivative* sources. As Matthew Kramer explains, “[n]ot every standard for legal validity is a component of [an ultimate] Rule of Recognition, for some such standards are derivative of the criteria which make up that overarching rule”.[[26]](#footnote-26)

The implication is that, in many legal systems, even primary legislation may be understood as a derivative source of law. Consider a legal system with a capital-C Constitution that establishes various branches of government including a parliament that is authorised to make legislative acts. Parliamentary legislation is, in the way just described, a derivative rather than a fundamental source of law. The fundamental source identified by the ultimate rule of recognition is the capital-C Constitution, which itself recognises further (derivative) sources.

Derivative sources of law are common in mature legal systems. In the UK, devolution legislation provides a familiar example. Another is the International Criminal Court Act 2001 which gives effect to a treaty to which the UK is party: the Rome Statute of the International Criminal Court. The Rome Statute was adopted by states at a diplomatic conference in 1998, and the ICC began operating in 2002 when the requisite number of state ratifications was met. The ICC investigates and tries individuals charged with certain international crimes stipulated under the treaty – namely, genocide, crimes against humanity, war crimes, and now the crime of aggression.[[27]](#footnote-27) S.50(1) of the ICC Act 2001 defines “genocide”, “crime against humanity” and “war crime”, and according to s.50(5):

In interpreting and applying the [terms in s.50(1)] the court shall take into account any relevant judgment or decision of the ICC. Account may also be taken of any other relevant international jurisprudence.

The first sentence of s.50(5) provides that the domestic court treat judgments of the ICC as a mandatory source of law. According to Hart, a mandatory source of law is a source which “a court in deciding a case is bound to attend to”.[[28]](#footnote-28) The second sentence of s.50(5) provides that the domestic court treat judgments of other international courts as a permissive source of law. Hart explains that, in the case of a permissive source, the “legal system does not *require*”, but rather permits, the court to attend to the source in reaching a decision.[[29]](#footnote-29)

S.50(5) of the ICC Act establishes two derivative sources of law, one mandatory and the other permissive.[[30]](#footnote-30) These are sources of law in that they are sources of legal norms – sources that go to determining what counts as the prohibited conduct of genocide, etc. They are also foreign rather than domestic sources. S.50(5) usefully illustrates some different ways in which foreign sources may be recognised. The possibilities are numerous. For instance, where a foreign source is recognised as mandatory, domestic courts may be required to *take into account*, or perhaps to *follow*, the source. And as well as variations in the duty’s content, the duty’s strength may also differ.

With all this in mind, it is unproblematic that the majority advances the twin claims that EU law is a (foreign treaty-based) source of law and that UK membership of the EU has not changed the (ultimate) rule of recognition. These are not incoherent claims. It is true that the majority does not always help itself in some of its statements.[[31]](#footnote-31) But the basic argument is theoretically sound.

 All these complications could be avoided if the (ultimate) rule of recognition were left to one side. It is something of a red herring, at least with regard to the question in *Miller*.[[32]](#footnote-32) But there is another way in which its overemphasis risks polluting the analysis. Suppose for a moment that, in the UK, EU law is indeed recognised as a source of law according to criteria in an ultimate rule of recognition. Even so, what turns on this? Does it mean that the foreign affairs prerogative cannot be used without statutory authorisation? It is wholly unclear why, or on what basis, a change to the ultimate rule of recognition would require an Act of Parliament. The ultimate rule of recognition is a customary rule that depends on the shared practice and acceptance of officials. The rule is not in Parliament’s keeping in the sense that it may not be unilaterally changed by Act of Parliament, although of course enactments may ultimately *cause* changes in the rule if they trigger changes in relevant official practice. It is therefore not quite right to say that *Miller* was “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*)”.[[33]](#footnote-33) Acts of Parliament may establish derivative sources of law – e.g. the ICC Act, or devolution legislation. But fundamental sources, such as Acts of Parliament, are determined by the (ultimate) rule of recognition.

To develop these points further, we should explore one last – and, I would suggest, similarly unsuccessful – argument that also seeks to press the (ultimate) rule of recognition into service. As the argument runs, the foreign affairs prerogative cannot be used if this will “bring about” a change in the (ultimate) rule of recognition. If this thesis is correct, we indeed ought to settle whether EU law is identified in the (ultimate) rule of recognition. But the thesis remains unmotivated. This can be seen by considering Paul Craig’s important analysis. Craig argues that “withdrawal from the EU would alter the rule of recognition, which constitutes part of the law of the land, and hence could not be done by the executive”.[[34]](#footnote-34) He acknowledges that the (ultimate) rule of recognition, dependent on official custom, cannot be unilaterally changed by Parliament.[[35]](#footnote-35) He suggests, however, that the ECA triggered or was a “catalyst for modification” of the customary practice of officials on which the (ultimate) rule of recognition depends.[[36]](#footnote-36) For Craig “[i]t follows that … legal developments that would denude [the ECA] of substance” – namely, the Government’s proposed use of the foreign affairs prerogative – “would thereby alter the rule of recognition, and in that sense alter the law of the land”.[[37]](#footnote-37) This, Craig argues, is prohibited in light of *inter alia* the *Case of Proclamations* (1610) according to which the prerogative may not be used to change the law.[[38]](#footnote-38)

 The argument is not successful, however. Following Craig’s own reasoning about the effect of the ECA, the unilateral use of the foreign affairs prerogative cannot deliberately change the customary (ultimate) rule of recognition; it may, however, cause changes in the official practice on which that rule depends. Why would that violate the principle in *Proclamations*? To insist that it does is to say that *Proclamations* stands for a sweeping proposition that any prerogative action is impermissible if it is such as to cause an eventual change in the relevant official custom. That would be an odd view, and not in line with what Craig says about legislative action. The sounder view is that, as with legislative action, sometimes prerogative action may indeed permissibly cause such changes. At least, no reason to think otherwise, whether in theory or in *Proclamations*, has been provided. Here we may note the useful distinction between the result of an act and the consequences of an act.[[39]](#footnote-39) It is argued that “to every act … there corresponds a change or an event in the world”.[[40]](#footnote-40) With an act’s result, the correspondence between the act and the result is intrinsic; the act of opening the window *results* in a change in the world whereby the window is open. With an act’s consequences, the correspondence between act and consequence is *causal*, hence “a consequence of the act of opening a window may be that the temperature in a certain room sinks”.[[41]](#footnote-41) Equally, the Government’s use of the foreign affairs prerogative may in some way *cause* changes in the rule of recognition. We have not yet been given a reason to think that this is constitutionally impermissible.

Additionally, although Craig suggests that the (ultimate) rule of recognition itself “constitutes part of the law of the land”,[[42]](#footnote-42) legal theorists debate whether it is a *legal* rule – i.e. part of the law of the system – or whether it stands apart from the law of the system.[[43]](#footnote-43) All this indicates that reliance on the (ultimate) rule of recognition does not seem to get us very far. Not only does it complicate the analysis, it distracts from the main issue in *Miller*: whether, in that case, prerogative action is impermissible without legislative authorisation.

**III. The majority’s description of EU law: looking ahead**

There is nothing theoretically amiss in the majority’s twin claims that EU law is a source of law, and that membership of the EU has not altered the UK’s (ultimate) rule of recognition. Furthermore, I have suggested that arguments focusing on the (ultimate) rule of recognition may be something of a blind alley. The fact is that the UK legal system recognises various sources of law. Some are fundamental sources identified by criteria in an ultimate rule of recognition, and many others are derivative sources. If we follow the majority’s reasoning, EU law, as a derivative source, warrants protection from being extinguished by prerogative action.

In this section I wish to look to the future. Now that *Miller* has been decided, what are its precedential implications? In particular, what should we make of the majority’s distinctive “source of law” analysis? Might there be *other* treaty-based sources, given effect under domestic legislation, that warrant the same protection that EU law received in *Miller*?

Regarding other sources, it is worth acknowledging at the outset that much will depend on how we construe the legislation that establishes the source domestically. This can be seen in *Miller*, where the majority and dissenting judges disagreed about the proper construction of the ECA given that it lacks an express provision concerning withdrawal from the EU. The Government took this opportunity to argue that the ECA was only a “conduit pipe” in the sense that it gave effect to EU law as long as the UK was party to the EU treaties, but without stipulating whether or not the UK was to *be* a treaty party – and, moreover, with nothing in the ECA *expressly excluding* the use of the foreign affairs prerogative to withdraw from the EU treaties.[[44]](#footnote-44) The majority disagreed, offering several interconnected lines of argument including the wording of the ECA[[45]](#footnote-45) and the alternative view that “rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the *proper analysis* is that, unless that Act positively created such a power in relation to those Treaties, it does not exist”.[[46]](#footnote-46)

At the same time, although construction issues were important in *Miller*, the majority also drew attention to certain properties of EU law – its being direct, independent, overriding and dynamic – that do not exclusively depend on the domestic legislative scheme. These are properties of EU law *itself*, albeit with their domestic expression partly conditioned by features of domestic law.

Now that *Miller* has been handed down, there is reason to think that courts will intervene – if appropriate circumstances present themselves – to protect a treaty-based source from being extinguished as a result of prerogative action internationally. The aim, looking ahead, is to clarify what those circumstances might be. We will also need to keep in mind the two dimensions set out above – namely, the properties of the treaty-based source itself, and the domestic legislative scheme establishing the source within the UK legal system.

***Extinction***

To understand the possible implications of *Miller* for other treaty-based sources, we first need to know whether UK withdrawal from any such treaty would extinguish that source of legal norms. The ultimate concern in *Miller* was, after all, to prevent improper source extinction. *Miller* would seem to apply to circumstances where domestic legislation gives effect to a treaty-based source *on the basis that* the UK is party to that treaty. It may be that the domestic legislation clearly and expressly requires that the UK be party to the treaty. Alternatively, absent clear and express wording, it may be that certain provisions are reasonably construed as assuming that the UK is to be a treaty party; this, of course, was how the majority construed the ECA in *Miller*. In either scenario, the concern animating *Miller* is that if the prerogative were used to withdraw from the treaty, domestic legislation would no longer give effect to the treaty-based source as it was supposed to. A source would be extinguished and the legislation frustrated.[[47]](#footnote-47)

An initial assessment of potential source extinction will depend on how the legislation is construed. And one of the challenges that we face is that legislation gives effect to treaties in different ways. Many statutes implement treaties by scheduling the treaty text – and, moreover, with operative provisions referring to the *scheduled* rather than the treaty text. As Shaheed Fatima explains: “Most incorporating statutes are self-contained transfusions of international law into domestic law. They have a clearly defined ambit and a restricted subject-matter. Other than their international dimension they are generally indistinguishable from purely domestic statutes”.[[48]](#footnote-48) In such circumstances, the statute gives effect to the treaty by domesticating it, such that UK treaty withdrawal will not disturb the statute’s continuing operation. One example is the Carriage of Goods by Sea Act 1971, giving effect to a series of treaty rules called the Hague-Visby Rules.[[49]](#footnote-49) S.1(1) describes the Hague-Visby Rules which, importantly, are scheduled to the Act.[[50]](#footnote-50) According to s.1(2) the Rules as set out in the *scheduled* text have the force of law. This scheme is reasonably construed as self-standing – a self-contained transfusion, in Fatima’s words – meaning that UK withdrawal from the relevant treaties would not affect the statute’s operation domestically.

The ECA provides an example a different type of legislative scheme. Notably, the text of the EU treaties – or of EU legislative acts adopted under the treaties – is not scheduled. Furthermore, in *Miller* the majority construed the ECA as giving effect to EU law *on the basis that* the UK was party to the EU treaties, and held that withdrawal would extinguish the source domestically: “Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law … after the United Kingdom had ceased to be bound by the EU Treaties”.[[51]](#footnote-51)

 Looking ahead post-*Miller*, can we identify other treaty-based sources that would be extinguished on treaty withdrawal? One possibility is the Human Rights Act 1998, giving effect to specified European Convention on Human Rights provisions. However, this is not a good case study for us because, as has been demonstrated, the HRA’s proper construction is significantly controversial.[[52]](#footnote-52) On one reading, the specified ECHR treaty rights, having been scheduled to the Act, are in fact domesticated and would continue to operate as domestic statutory rights following UK treaty withdrawal. Moreover, the s.2 duty falling upon domestic courts to take into account relevant ECtHR case law – a statutory provision that establishes ECtHR *case law* as a mandatory source – would, on this reading, also be unaffected on treaty withdrawal. Domestic courts would remain capable of performing their s.2 duty, and so the treaty-based source established under that provision would not face extinction. On another reading of the HRA, however, the Act’s giving effect to the ECHR is predicated on the UK remaining a treaty party – such that UK withdrawal would indeed extinguish ECHR rights, despite their being scheduled. (It would also render nugatory the operation of s.2.) This alternative reading of the HRA focuses on how s.1(1) defines “the Convention rights” by reference to certain specified provisions of the “Convention”. This is significant because, according to s.21(1):

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 *as it has effect for the time being in relation to the United Kingdom* …[[53]](#footnote-53)

The alternative reading draws upon other HRA provisions – e.g. derogations under ss.14 and 16 – that also appear to assume that the UK is to remain a treaty party. Overall, (at least) two plausible readings of the HRA are available. Gavin Phillipson and Alison Young conclude in their study that it is unclear which reading would be preferred and that “[i]n the end … the question of whether the HRA becomes a dead letter [following UK withdrawal from the ECHR] or morphs into a free-standing Bill of Rights may become a matter of judicial construction, driven by the constitutional context”.[[54]](#footnote-54)

 The HRA is not a straightforward case study for exploring source extinction and the precedential implications of *Miller*. I will instead use another case study to test *Miller*’s implications as we look ahead. The primary legislation is the Railways and Transport Safety Act 2003, s.103 of which seeks to give effect to an international treaty: the Convention concerning International Carriage by Rail (“COTIF”).[[55]](#footnote-55) COTIF establishes an international organisation under Article 1(1): the Intergovernmental Organisation for International Carriage by Rail. Its aim under Article 2 is “to promote, improve and facilitate, in all respects, international traffic by rail” including by “establishing systems of uniform law”, “contributing to the removal … of obstacles to the crossing of frontiers in international rail traffic”, “contributing to … technical harmonisation in the railway field by the validation of technical standards and the adoption of uniform technical prescriptions”, and so on. Several organs are established under Article 13 including the General Assembly, the Revision Committee, the Committee of Technical Experts, and the Secretary General. Although more confined in scope than the EU treaties, COTIF’s aim of securing uniformity in the railway field – and its establishment of a sophisticated institutional structure comprising rule-making organs – bears some resemblance to EU law.

S.103 and Schedule 6 of the 2003 Act establish a method for giving effect to COTIF through the enactment of secondary legislation (i.e. Regulations). Sch.6, para.2 provides:

Regulations may—

(a) make provision enabling *a right or duty arising under the Convention* to be enforced …[[56]](#footnote-56)

This appears to assume that the UK is a treaty party and therefore subject to norms arising under the treaty. Another example is Sch.6, para.3(2):

In particular, the regulations may—

… (c) provide for a suspension under Article 35(4) of the Convention to be disregarded except in so far as it relates to the United Kingdom …

Article 35(4) of COTIF itself provides that “*Member States* may formulate an objection” (emphasis added) to a proposed treaty modification. And there are other examples;[[57]](#footnote-57) as with the ECA, various provisions indicate that the UK is to remain a treaty party.

The Railways (Convention on International Carriage by Rail) Regulations 2005 were subsequently adopted under the 2003 Act. Para.3(1) of the 2005 Regulations provides that the “Convention shall have the force of law in the United Kingdom, and judicial notice shall be taken of it”. Again, as with EU law and the ECA, COTIF is given effect without being scheduled to the 2003 Act or the 2005 Regulations.

Overall, the legislative scheme implementing COTIF assumes that the UK is party to COTIF. In addition, the treaty is not scheduled. We may reasonably conclude that UK withdrawal from COTIF would extinguish the treaty-based source domestically; this aligns with the majority’s approach to EU law’s extinction in *Miller*. In what follows, COTIF and its implementing legislation will serve as a case study to test the implications of *Miller*, particularly with regard to the majority’s distinctive “source of law” analysis. It is hoped that the case study will be instructive since it exhibits both important similarities and also certain differences with EU law and the ECA.

***“Direct”***

Assuming that the threshold requirement of source extinction has been met, we must make sense of those properties of the treaty-based source to which the majority repeatedly drew attention in *Miller* – namely, with respect to EU law, its being “direct”, “dynamic”, “independent”, and “overriding”. Each of these properties will be discussed in turn.

Regarding “direct”, the majority explained that EU law is capable of applying domestically “without the specific sanction of any UK institution”.[[58]](#footnote-58) The adjective “automatic” is also used.[[59]](#footnote-59) At the same time the majority stressed that EU law only takes effect in the first instance via the more general authorisation under s.2(1) of the ECA.[[60]](#footnote-60) Although the statements may appear puzzling the general idea is that s.2(1) provides a standing platform by which EU law takes effect domestically. In this vein, we should consider s.18 of the European Union Act 2011 which helps us to grasp the majority’s understanding of “direct”:

Status of EU law dependent on continuing statutory basis

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

In line with this provision, the majority seemed to focus on s.2(1) of the ECA, the mechanism by which directly effective EU law takes effect. The classical understanding of the doctrine of direct effect describes the circumstance where an EU legal rule confers a sufficiently clear, precise and unconditional right on an individual, who may directly enforce that EU right in domestic proceedings and in the absence of further domestic implementing measures. But note that s.2(1) is not limited to directly effective EU law. For instance, it also allows for directly applicable EU acts to take effect – namely, EU Regulations, each of which “shall be binding in its entirety and directly applicable in all Member States” (Article 288 TFEU). Direct applicability and direct effect can sometimes be mistakenly conflated. For example, an EU Regulation is directly applicable, but if its provisions do not satisfy the conditions of direct effect it is not directly effective and thus cannot be enforced by individuals in domestic proceedings.

The majority recognised that a great deal of EU law does not take effect “directly” – i.e. is not directly effective or directly applicable.[[61]](#footnote-61) Ministers are instead empowered to adopt domestic implementing measures under s.2(2):

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; …

Another example is a new EU *treaty*. According to s.1(3) of the ECA:

If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the EU Treaties herein defined [i.e. the list of treaties set out in s.1(2)], the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972 … shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.[[62]](#footnote-62)

We should also note various requirements under the European Union Act 2011 regarding the ratification of new EU treaties, including approval by Act of Parliament under s.2(1)(b) of the 2011 Act. These are all obstacles in the way of a new EU treaty taking effect. Thus, the extent to which EU law is a “direct” source in the way that the majority meant – i.e. taking effect directly or automatically – is contingent. EU law is qualifiedly “direct”.

 Clarifying this issue is important because it is, at times, slightly obscured in the majority’s discussion. This can be seen, for example, in its analysis of double taxation treaties which now take effect under the Taxation (International and Other Provisions) Act 2010. The majority indicated that this legislation did not treat rights established under double taxation treaties as a “direct” (or “automatic”): “unlike EU law which becomes part of UK law automatically as a result of the 1972 Act, the arrangements under a [double taxation treaty] do not take effect automatically as a result of … [the 2010 Act], but only through a specific Order in Council which has to be approved” by the House of Commons.[[63]](#footnote-63) The difficulty, as we have seen, is that various EU legislative acts, and new EU treaties, will also take effect domestically only if there are specific domestic implementing (or ratifying) measures.

Given, then, that EU law itself is only qualifiedly “direct”, we should ask how “direct” another source must be to satisfy this property in *Miller*. The aim is to delineate those treaty-based sources which take effect “directly” (for *Miller* purposes) under their domestic legislative schemes, and those which do not. Although the matter is not entirely clear, arguably the majority in *Miller* was moved by the idea of a legislative platform that is, to some significant degree, a *standing* one – i.e. a platform that gives effect to a treaty-based source without the repeated need for specific implementing measures. This accounts for the majority’s view that EU law is (to some degree) capable of taking effect domestically “without the *specific* sanction of any UK institution”.[[64]](#footnote-64) On this reading of *Miller* we should distinguish a standing legislative platform from circumstances where specific implementing measures, mediating between the treaty and domestic law, are repeatedly required from case to case.

If we follow this reading, we can identify as “direct” the legislative implementation of other treaty-based sources – in particular, COTIF concerning international rail traffic. As noted earlier, the Railways (Convention on International Carriage by Rail) Regulations 2005 were adopted under s.103 of the Railways and Transport Safety Act 2003, with para.3(1) of the 2005 Regulations providing that COTIF “shall have the force of law in the United Kingdom, and judicial notice shall be taken of it”. The 2005 Regulations establish a standing legislative platform through which new rules made by the treaty-based organisation take effect without the repeated need for specific implementing measures. Thus, as the Explanatory Note to the 2005 Regulations describes:

Any modifications made to COTIF by any decision of the Revision Committee, the RID Expert Committee or the Committee of Technical Experts, shall automatically have the force of law, by virtue of the definition of “the Convention” in regulation 2(2).

Indeed, this was the very purpose of the legislative scheme giving effect to COTIF, as made clear in the (separate) Explanatory Memorandum to the 2005 Regulations:

4.5. Implementation of COTIF 1980 in the UK. The 1980 version of COTIF was given effect in the UK by the International Transport Conventions Act 1983 (‘1983 Act’). However the 1983 Act is not sufficiently flexible to deal with implementation of the more fluid 1999 version of COTIF. In particular the 1983 Act’s provision that *any* revisions to the Convention could only be brought into effect by Order in Council, upon a recommendation approved by resolution of both Houses of Parliament, is no longer appropriate given that COTIF 1999 is intended to be more of a living document undergoing frequent minor change through committee processes, for example to amend particular detailed technical standards.

4.6. Implementation of COTIF 1999 in the UK. The Government has therefore obtained new primary powers – in section 103 of the Railways and Transport Safety Act 2003 (‘2003 Act’) – to give effect to [COTIF 1999] by regulations, rather than relying on the 1983 Act. The 2003 Act makes provision for a reference in such regulations to [COTIF 1999] to be treated, following modification, as a reference to [COTIF 1999] as so modified …[[65]](#footnote-65)

A critic may wish to deny that COTIF’s implementing legislation establishes a “direct” source given that the legislative scheme depends on secondary legislation in the shape of the 2005 Regulations. But this would be an arbitrary view. As the above excerpt shows, it so happens that legislative implementation of (the old) COTIF had previously been achieved solely by primary legislation – namely, s.1(3) of the International Transport Conventions Act 1983 requiring that “judicial notice shall be taken of [the treaty] provisions as if they were contained in this Act”. As the excerpt also notes, the previous legislative scheme was replaced because it was less flexible; it stipulated (under s.8 of the 1983 Act) that each treaty revision only took effect domestically by means of a specific Order in Council. The current legislative scheme gives effect to the updated and more fluid COTIF 1999 and it so happens that the scheme combines primary and secondary legislation. Importantly, the secondary legislation – the 2005 Regulations – adopted under s.103 of the 2003 Act is a general and *standing* platform for giving effect to COTIF and the various rule changes that take place under that treaty. It is very different from the repeated enactment of specific implementing measures. Lastly, the 2005 Regulations are not easily disturbed. Their repeal would (according to s.14 of the Interpretation Act 1978) need to satisfy the affirmative procedure under s.103(5) of the 2003 Act requiring that the draft be “laid before and approved by resolution of each House of Parliament”.

Arguably, then, it would be a crudely formalistic reading of *Miller* to insist that a treaty-based source is necessarily disqualified as “direct” if the *standing* platform by which it is established happens to be secondary legislation. Indeed, given the growth in secondary legislation it would be odd to restrict the implications of *Miller* only to standing platforms under primary legislation. The better view is that, practically speaking, what counts is the establishment of a functionally “direct” legislative platform. COTIF is an interesting case study in this respect because it suggests that legislative schemes may establish a treaty-based source as “direct” through a combination of primary and secondary legislation. The 2005 Regulations, adopted under the 2003 Act, give effect to COTIF (and all the various rule changes under that treaty) directly and automatically, and represent a standing platform that can only be repealed if each House of Parliament approves.

***“Dynamic”***

In *Miller* the term “dynamic” described the changeable quality of EU law. Again, to grasp the contours of this property we should begin by examining EU law before turning to assess the implications for other treaty-based sources such as COTIF.

A notable feature of EU law is the regular production of EU legislative acts – Regulations, Directives and Decisions (Article 288 TFEU) – by means of stipulated legislative procedures (Article 289 TFEU). At a more basic level, EU law is dynamic in that the content of *treaty* requirements may change – e.g. in light of the Court of Justice’s developing case law. Consider the treaty provisions concerning the completion of the internal market, such as Article 34 TFEU providing that “[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. The range of domestic measures having equivalent effect to quantitative restrictions on imports has changed over time in light of changing constructions of Article 34, and with significant implications for the internal market.[[66]](#footnote-66) This would suggest that changeable treaty requirements may be treated as an important aspect of EU law’s dynamism.

All international treaties are potentially dynamic in this latter sense (including e.g. the UK-Russia double taxation treaty). Some treaties are avowedly dynamic. For example, in *Tyrer v United Kingdom* the ECtHR described the ECHR as “a living instrument which … must be interpreted in the light of present-day conditions”.[[67]](#footnote-67) Even where a treaty does not establish a court (or any sort of institutional apparatus), treaty requirements may change under the influence of the treaty parties – e.g. according to Article 31(3) of the 1969 Vienna Convention on the Law of Treaties “[t]here shall be taken into account … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

So when it comes to treaty-based sources, how should “dynamic” in *Miller* be understood? The problem is that dynamism is a scalar property. Would treaty requirements that change simply on the basis of evolving state practice count as sufficiently “dynamic” for *Miller* purposes? Or must a treaty establish an institutional apparatus that regularly produces legislative acts, perhaps to the same extent as the EU, to be “dynamic”? *Miller* leaves us somewhat in the dark about exactly where to draw the line. There are further complications as well – e.g. dynamism, as a property of the source, can *itself* vary over time. EU institutions faced significant legislative gridlock before the adoption of the Single European Act which *inter alia* provided for the more widespread use of qualified majority voting in the Council.[[68]](#footnote-68)

 Although it is difficult to delineate the precise implications of *Miller* here, it is also not unreasonable to think that COTIF would count as “dynamic”. A sophisticated institutional apparatus is established under Article 13 of that treaty, and various organs are tasked with reviewing and amending COTIF obligations. Earlier we noted the Explanatory Memorandum to the 2005 Regulations, according to which “COTIF 1999 is intended to be more of a living document undergoing frequent minor change through committee processes, for example to amend particular detailed technical standards”.[[69]](#footnote-69) Hence para.2(2) of the 2005 Regulations provides:

… “the Convention” means the version of the “Convention concerning International Carriage by Rail (COTIF(4)) of 9th May 1980” … as modified in accordance with its provisions from time to time by a decision of one of the committees under paragraph 4, 5 or 6 of Article 33 [i.e. COTIF’s amendment procedures], as the case may be, whether such modification occurs before or after the coming into force of these Regulations …[[70]](#footnote-70)

Overall, we have reason to think that other treaty-based sources such as COTIF qualify as “dynamic” in light of *Miller*. But some questions remain and further guidance is needed.

***“Independent”***

What about “independent”? The majority in *Miller* provoked disagreement by describing EU law as an “independent” source of law.[[71]](#footnote-71) In his dissenting opinion Lord Reed stated that “EU law is not itself an independent source of domestic law, but depends for its effect in domestic law on the 1972 Act”.[[72]](#footnote-72) Arguably, however, Lord Reed and the majority were talking past each other. The majority did not deny that the ECA gives effect to EU law domestically. It meant something else by independence. The gist, it seems, is the identity of the law-making agent. Consider EU legislation which is made by the EU legislator. The thought seems to be that “it is the EU institutions, not Parliament, that make and change EU law”.[[73]](#footnote-73) Of course, UK institutions participate in EU legislating. For example, Government ministers are represented on the Council (Article 16 TEU), and Parliament may participate by issuing reasoned opinions on draft EU legislative acts (Articles 6 and 7 of Protocol No. 2 on the Application of the Principles of Subsidiarity). But this remains participation only; EU legislation is made by the EU legislator, not by the UK Government or Parliament. This is what the majority meant by “independent” in *Miller*. It is not a property with meaningful distinguishing power, however, since by definition it will be exhibited by foreign treaty-based sources including COTIF.

***“Overriding”***

Lastly, the majority states that, under the ECA, EU law is “overriding” given the reception of the EU doctrine of supremacy, according to which EU law takes priority over conflicting domestic law. This property is described as “unprecedented”.[[74]](#footnote-74) At first blush it is hard to disagree. Other comparable examples do not seem to be forthcoming; our case study, COTIF, would not seem to qualify as an “overriding” treaty-based source.

 On closer inspection, however, EU law’s “overriding” status is rather less straightforward. Once again, we should begin by inspecting EU law and its domestic implementation more closely. Certainly, the EU’s position on supremacy is uncompromising.[[75]](#footnote-75) But the domestic reception is more mixed.[[76]](#footnote-76) Lord Denning MR was describing a common view when he noted in *Macarthys v Smith* that “[i]f the time should come when our Parliament deliberately passes an Act — with the intention of … acting inconsistently with [the EU Treaties] — and says so in express terms — then I should have thought that it would be the duty of our courts to follow the statute of our Parliament”.[[77]](#footnote-77) Put another way, EU law has overriding effect “to the extent that subsequent Acts take for granted and thus maintain this rule of priority”.[[78]](#footnote-78) Moreover, as suggested by the judgment in *HS2*, where the requirements of constitutional statutes such as the Bill of Rights 1689 and the ECA are conflicting it is not necessarily the case that the ECA – and thus EU law – would take priority.[[79]](#footnote-79) Rather, it is possible that the courts would recognise the priority of principles “hitherto also regarded as fundamental and enshrined in the Bill of Rights”.[[80]](#footnote-80)

Thus, at the domestic level, EU law’s overriding quality is qualified. This muddies the waters a little. It prompts the question whether, in light of *Miller*, the courts might be willing to protect another treaty-based source that frequently but not always takes priority over other conflicting domestic rules. Indeed, in *Miller* the majority itself drew attention to how EU law’s primacy was only the “normal rule” and described circumstances where legislation “will have domestic effect even if it infringes EU law … because of the principle of Parliamentary sovereignty”.[[81]](#footnote-81)

Finally, returning to COTIF, it is worth mentioning that Sch.6 para.2 of the Railways and Transport Safety Act 2003 provides:

Regulations may—

… (e) apply, disapply or modify the effect of an enactment …

While this sort of provision is hardly unique in UK legislation and should not be exaggerated, it provides a healthy reminder of how domestic legislation can strive to prioritise UK treaty obligations in areas other than EU law. In the committee stage of (what was then) the Railways and Transport Safety Bill in the House of Commons, the Minister explained that:

The power in paragraph 2(e) would enable the United Kingdom to give effect to aspects of the convention [i.e. COTIF] by the most expedient means. That could be by modifying existing statutory provisions or by applying them in the context of the convention. In some cases that will be far more efficient than drafting completely new provisions that largely repeat existing legislation.[[82]](#footnote-82)

***Summary***

Now that *Miller* has been laid down, we should reflect on whether other treaty-based sources might warrant protection from being extinguished via prerogative action on the international plane. This will depend on how the domestic legislation giving effect to the treaty is construed. Here, the threshold requirement of source extinction restricts *Miller*’s influence. On a proper construction of many legislative schemes, source extinction would not follow UK treaty withdrawal.

Assuming that the threshold is met, however, the majority’s reasoning in *Miller* may be signalling that protection is available to a treaty-based source exhibiting certain significant properties. On this view it is mistaken simply to view *Miller* as a constitutional one-off. Rather, we should unpack the properties advanced in the majority’s reasoning in order to understand its potential precedential implications.

How much progress has been made? We have used a case study – COTIF and its domestic implementing legislation – to anchor the analysis. This is in some ways similar to EU law and the ECA regime, and in some ways different. It is a challenge to draw firm conclusions about *Miller*’s applicability to COTIF. Nonetheless, it has allowed us to test the implications of the majority’s reasoning, including by revealing important limitations in the guidance that *Miller* provides as we look ahead. For example, we have found a lack of clarity about exactly what the properties of “direct”, “dynamic”, and “overriding” mean. A related problem is that it is unclear how the various properties work together. Consider “overriding”. If a treaty-based source must be “overriding” in just the same way as EU law,[[83]](#footnote-83) *Miller* may be highly confined as to the sources that fall under its protection. Perhaps, at present, only EU law qualifies. On another reading, we need not understand “overriding” in exactly that way, or place quite so much weight on it, partly because it renders the majority’s discussion of the *other* properties superfluous – and because a more attractive reading can bring more of those other properties into the mix. Thus, a fuller understanding of each property may hinge on its relation to *other* properties. Indeed, there may be yet further important properties that have not been pinpointed. These may be implicit in the majority’s reasoning, or they may have been overlooked.

Key to all this is better understanding *why* a treaty-based source exhibiting such properties as being “dynamic” or “overriding” warrants protection. Although the burden of explanation falls on the majority, it is not discharged in *Miller*. Nonetheless, I do not think that we should be too tough. The majority was asked to address a specific question concerning the ECA and the foreign affairs prerogative, and could not reasonably pursue a more wide-ranging analysis of the sort that academic writers typically favour.

 Before moving on I should say something about the “major change” argument in *Miller* – i.e. the majority’s various statements that the prerogative cannot be used in a way that “effects a *fundamental change* in the constitutional arrangements of the United Kingdom”,[[84]](#footnote-84) that its use “would be inconsistent with long-standing and fundamental principle [that] such a *far-reaching change* to the UK constitutional arrangements [cannot] be brought about ministerial … action alone”,[[85]](#footnote-85) and that the majority “cannot accept that a *major change* to UK constitutional arrangements can be achieved by ministers alone”.[[86]](#footnote-86) Some writers have treated the major change argument as separable from the argument about sources.[[87]](#footnote-87) This, in turn, has led to trenchant criticism that the major change argument itself “offers little by way of guidance”.[[88]](#footnote-88) For instance, could the risk of major changes to the constitution block the use of the foreign affairs prerogative even if this has nothing to do with the extinction of treaty-based sources? The matter is all the more concerning, the criticism runs, because we have precious little understanding of what counts as major change.

Again, in keeping with the spirit of this paper, I think that a more sympathetic reading is possible. If we take the major change argument as a separate argument – that is, an independent ground for the majority’s decision – we are indeed grasping for what it means. But a different reading is available. We have seen that so much in the majority’s judgment is about sources. As one writer puts it, the “status [that] EU law had as a source of law … became a *leitmotif* of the judgment”.[[89]](#footnote-89) Where there is reference to major change, this is often bound up in the question of sources – e.g. when summing up the majority explains that “the consequential loss of a source of law is a fundamental legal change”.[[90]](#footnote-90) This shows not just how the majority’s remarks about major change are embedded in the discussion of sources, but also that it is in the discussion of sources that the majority is doing the heavy lifting – before going on to *present* or summarise the implications in the language of major, fundamental or far-reaching change.[[91]](#footnote-91) This is one permissible reading, at least, and it confines the majority’s grander statements to the particular context. Although those remarks are attention-grabbing, this reading suggests that they should not be exaggerated.

Another reason not to make too much of the majority’s remarks about major change is that it would risk reproducing a theoretical mistake that was considered earlier. As we know, it is possible that prerogative action on the international plane could be a *cause* of changes in the UK legal system at the level of the (ultimate) rule of recognition, in the sense that it could cause or trigger eventual changes in the official custom on which the (ultimate) rule of recognition depends. This would, in a sense, be to bring about a “fundamental change” to the legal system.[[92]](#footnote-92) But it would be unreasonable to take the majority’s statements as setting out an independent ground as to when prerogative action is impermissible. For such a reading would itself make the theoretical mistake of assuming that changes in the (ultimate) rule of recognition may not have as an initial cause or trigger prerogative action.[[93]](#footnote-93)

**IV. Proposals**

We lack a degree of clarity about *Miller*’s implications for other treaty-based sources. But I am also reminded that statements of this sort – “things are unclear” – may not be the most impressive conclusion to an argument.[[94]](#footnote-94) Are there any practical solutions available? I will suggest two – one judicial, and the other legislative.

Clarity may improve if courts are asked to rule on other legislative arrangements that establish treaty-based sources – along the lines of our analysis of COTIF. Such comparisons will allow for – indeed, require – a more searching analysis about where to draw the line(s) than was possible in *Miller*. Of course, this assumes that history will to some extent repeat itself – namely, the Government’s seeking treaty withdrawal without prior legislative authorisation, as well as legal challengers who are willing to step forward. For some, at least, this is a big “if”. Lord Mance has suggested extra-judicially that the issue in *Miller* is unlikely to be repeated “in our lifetimes”.[[95]](#footnote-95)

A legislative solution is also possible. By this I do not mean *ex post facto* enactments such as the European Union (Notification of Withdrawal) Act 2017 passed in response to *Miller*. The problem that arose in *Miller* was that the Supreme Court was asked to construe the ECA in the absence of express words about treaty withdrawal in the Act itself. It is worth noting that legislation giving effect to other treaties tends not to contain express words about treaty withdrawal either. Accordingly, one option is that Parliament, when legislating to give effect to a given treaty, expressly stipulate that statutory authorisation is required – or not required, as the case may be – prior to treaty withdrawal. Another forward-looking solution is a more general legislative regime governing treaty withdrawal generally.

In *Miller* the majority does touch on a (localised) legislative solution:

… it would have been open to Parliament to provide expressly that the constitutional arrangements and the EU rights introduced by the 1972 Act should themselves only prevail from time to time and for so long as the UK government did not decide otherwise, and in particular did not decide to withdraw from the EU Treaties … Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided.[[96]](#footnote-96)

Express legislative stipulation would slice through the problem. But whether there is appetite for such a solution remains to be seen. The Government may not wish to tie its hands on treaty withdrawal and may instead seek to rely, where possible, on prerogative action – all the while hoping to avoid being caught by *Miller*’s net. If so, we should continue to reflect on how widely or narrowly that net may be cast.

**V. Concluding remarks**

Various criticisms have been made of the majority’s judgment in *Miller*. I do not wish to suggest that these are all unsound. But more can be done to read the judgment sympathetically. This has been my first aim in the paper. My second aim has been to consider the implications of *Miller* as we move forward. Whether or not we believe that the majority’s judgment was sound – as a matter of law, political morality, or both – where does *Miller* take us? The answer is unclear. Lawyers, judges and law-makers have given themselves plenty to do.

1. \* Southampton Law School. I am very grateful to David Feldman and to audiences in Reading and Southampton. [↑](#footnote-ref-1)
2. R (*Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. [↑](#footnote-ref-2)
3. Strictly the Short Title of the Act is inaccurate because Article 50(2) TEU envisages the notification of an *intention* to withdraw, not of withdrawal. See P. Allott, “The Short Title of the European Union (Notification of Withdrawal) Bill Is Incorrect”, *https://ukconstitutionallaw.org/2017/01/30/philip-allott-the-short-title-of-the-european-union-notification-of-withdrawal-bill-is-incorrect/* [Accessed 1 October 2018]. [↑](#footnote-ref-3)
4. *Miller*, para. 101. This was the main finding. The majority also went on to consider the implications of subsequent legislation such as the European Parliamentary Elections Act 2002, although it continued to rely on the main finding– e.g. para. 115. [↑](#footnote-ref-4)
5. *Miller*, para. 60. [↑](#footnote-ref-5)
6. *Miller*, para. 64. [↑](#footnote-ref-6)
7. *Miller*, para. 65. Also para. 80: “the 1972 Act effectively constitutes EU law as an entirely new, independent and overriding source of domestic law”. [↑](#footnote-ref-7)
8. *Miller*, para. 90. [↑](#footnote-ref-8)
9. *Miller*, para. 79. [↑](#footnote-ref-9)
10. This “novel line of reasoning … went further than the Divisional Court had done and was more subtle than the arguments advanced by the Applicants and various Interveners”: N. Aroney, “R (*Miller)* v *Secretary of State for Exiting the European Union*: Three Competing Syllogisms” (2017) 80 M.L.R. 726, at p.740. Also P. Birkinshaw, “Brexit Editorial Issue 2 Vol 23 June 2017” (2017) 23 European Public Law 205 at p.209: “This is a powerful and novel – dare one say revolutionary? – statement of UK constitutional law”; T. Poole, “Devolution to Legalism: On the Brexit Case” (2017) M.L.R. 696 at p.700. [↑](#footnote-ref-10)
11. *Miller*, para. 81. [↑](#footnote-ref-11)
12. *Miller*, para. 81. [↑](#footnote-ref-12)
13. *Miller*, para. 60. [↑](#footnote-ref-13)
14. I will also not be discussing criticism of other parts of the majority’s reasoning (e.g. its treatment of the devolution question). [↑](#footnote-ref-14)
15. *Miller*, para. 228. [↑](#footnote-ref-15)
16. *Miller*, para. 228. [↑](#footnote-ref-16)
17. *Miller*, para. 228. [↑](#footnote-ref-17)
18. *Miller*, para. 229. [↑](#footnote-ref-18)
19. *Miller*, para. 204. [↑](#footnote-ref-19)
20. M. Elliott, “The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle” (2017) 76 C.L.J. 257 at pp.271-272. Elliott does consider whether the claims can be reconciled but suggests that doing so would only render them vacant: see pp.272-273. [↑](#footnote-ref-20)
21. P. Craig, “*Miller*, Structural Constitutional Review and the Limits of Prerogative Power” [2017] P.L. 48 at pp.66-67 (footnotes omitted). [↑](#footnote-ref-21)
22. E.g. R. Ekins, “Constitutional Practice and Principle in the Article 50 Litigation” (2017) 133 L.Q.R. 347 at p.349. [↑](#footnote-ref-22)
23. I refer to *an* ultimate rule of recognition because writers, including Hart, allow for the possibility that more than one ultimate rule of recognition may be present in a legal system. [↑](#footnote-ref-23)
24. G. Lamond, “Legal Sources, the Rule of Recognition, and Customary Law” (2014) 59 American Journal of Jurisprudence 25. [↑](#footnote-ref-24)
25. E.g. J. Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) at p.95: “There is no reason to suppose that the rule of recognition refers to all the criteria of validity of a legal system, and it is clearly wrong to think that it determines them all … Besides the rule of recognition, other laws can also set criteria of validity”. M.D. Adler and K.E. Himma, “Introduction” in M.D. Adler and K.E. Himma (eds.), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) at xiii: “In any mature legal system, Hart claims, officials accept and practice a social rule of recognition that defines the system’s *ultimate* criteria of legal validity” (emphasis added). Regarding the implications for *Miller*, see H. Dindjer, “Sources of Law and Fundamental Constitutional Change”, *https://ukconstitutionallaw.org/2017/01/27/hasan-dindjer-sources-of-law-and-fundamental-constitutional-change/* [Accessed 1 October 2018]. [↑](#footnote-ref-25)
26. E.g. M.H. Kramer, *Where Law and Morality Meet* (OUP 2004) at p.110. [↑](#footnote-ref-26)
27. The ICC’s jurisdiction over the crime of aggression was activated by a resolution adopted by the Assembly of States Parties in December 2017. The UK itself has not ratified the amendment on the crime of aggression, nor has the ICC Act 2001 been updated. [↑](#footnote-ref-27)
28. H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) at p.294. [↑](#footnote-ref-28)
29. Ibid. (emphasis in the original). [↑](#footnote-ref-29)
30. Some writers would say that s.50(5) establishes two “lower-level” recognition rules. E.g. J. Gardner, *Law as a Leap of Faith* (OUP 2012) at p.101: “As in Hart’s most careful formulations … I speak of *ultimate* rules of recognition because there are plenty of … lower-level rules of recognition in every legal system, eg … those identifying a local council as the source of legally binding planning decisions” (emphasis in the original). [↑](#footnote-ref-30)
31. E.g. *Miller*, para. 90 where the majority states that, in EU law, “a … source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts”. This may give the misleading impression that (leaving aside EU law) there are two sources of law. In fact, many sources are recognised in the UK legal system, and many of these are derivative sources. [↑](#footnote-ref-31)
32. This may be contrasted with those approaches which also seek to advance sympathetic readings of (at least this part of) the majority’s reasoning in *Miller*, but which continue to try to make something of the (ultimate) rule of recognition. E.g. J. Grant, “Prerogative, Parliament and Creative Constitutional Adjudication: Reflections on *Miller*” (2017) 28 King’s Law Journal 35 at pp.50-51; R. Craig, “A Simple Application of the Frustration Principle: Prerogative, Statute and *Miller*” [2017] PL 25 at pp.45-46. [↑](#footnote-ref-32)
33. Aroney, “R (*Miller)* v *Secretary of State*”, at p.744 (emphases added). [↑](#footnote-ref-33)
34. Craig, “*Miller*, Structural Constitutional Review and the Limits of Prerogative Power”, at pp.64-65. Strictly, Craig does not himself think that EU law is identified as a source of law in the (ultimate) rule of recognition. (As we saw earlier, he endorses Elliott’s view about sources and the rule of recognition; see note 20 above.) Rather, Craig suggests that UK membership of the EU changed the (ultimate) rule of recognition by establishing within that rule a “priority” relationship whereby “the courts would construe statutes so as to conform to EU law unless Parliament expressly and unequivocally stipulated to the contrary, or unless this followed by necessary implication”; ibid., at p.66. For our purposes this is not significant. Craig’s reasoning may be adapted to serve the specific argument that we are considering. [↑](#footnote-ref-34)
35. Ibid., at p.66. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. 77 E.R. 1352 (KB). See Craig, “*Miller*, Structural Constitutional Review and the Limits of Prerogative Power”, at p.50. Also *Miller*, para. 44. [↑](#footnote-ref-38)
39. See G.H. von Wright, *Norm and Action: A Logical Enquiry* (Routledge & Kegan Paul 1963) 39-41. [↑](#footnote-ref-39)
40. Ibid., at p.39. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Craig, “*Miller*, Structural Constitutional Review and the Limits of Prerogative Power”, at p.64. [↑](#footnote-ref-42)
43. E.g. Hart, The Concept of Law, at pp.111-112; Lamond, “Legal Sources, the Rule of Recognition, and Customary Law”. [↑](#footnote-ref-43)
44. Lord Reed in his dissenting judgment thought that the ECA “imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU. It does not, therefore, affect the Crown’s exercise of prerogative powers in respect of UK membership”; see *Miller*, para. 177. [↑](#footnote-ref-44)
45. E.g. *Miller*, paras. 84 and 88. [↑](#footnote-ref-45)
46. *Miller*, para. 86 (emphasised added), and see also paras. 87-88. [↑](#footnote-ref-46)
47. If the treaty in question were bilateral, UK withdrawal would also result in termination of the treaty itself. [↑](#footnote-ref-47)
48. S. Fatima, *Using International Law in Domestic Courts* (Hart 2005) at p.56. [↑](#footnote-ref-48)
49. See *Miller*, para. 74: “Mr Eadie [on behalf of the Government] pointed out that the 1972 Act does not simply incorporate the EU Treaties into UK law in the same way as, say, the Carriage of Goods by Sea Act 1971 incorporates the Hague Rules”. [↑](#footnote-ref-49)
50. One minor complication is that the 1979 Protocol described in s.1(1) is not scheduled. [↑](#footnote-ref-50)
51. *Miller*, para. 77. [↑](#footnote-ref-51)
52. See, in particular, the illuminating analysis in G. Phillipson and A.L. Young, “Would Use of the Prerogative to Denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from *Miller*” [2017] P.L. 150. [↑](#footnote-ref-52)
53. Emphasis added. [↑](#footnote-ref-53)
54. Phillipson and Young, “Would Use of the Prerogative to Denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from *Miller*”, at p.174. Given the complexity of the relationship between the HRA and the ECHR, both writers also conclude by calling for further study. [↑](#footnote-ref-54)
55. As the Explanatory Note to the 2003 Act sets out, COTIF is an acronym for “Convention Relative aux Transports Internationaux Ferroviaires”. [↑](#footnote-ref-55)
56. Emphasis added. [↑](#footnote-ref-56)
57. E.g. para.5(1): “Regulations may specify conditions which must be satisfied before a person may— (a) exercise *a right under the Convention*, or (b) do something *to which the Convention applies*” (emphases added). Also, para 6(1): “Regulations may provide a criminal or other sanction in connection with *a duty arising under the Convention* or the regulations” (emphasis added). [↑](#footnote-ref-57)
58. *Miller*, para. 61. [↑](#footnote-ref-58)
59. *Miller*, para. 61. [↑](#footnote-ref-59)
60. *Miller*, para. 61. [↑](#footnote-ref-60)
61. *Miller*, para. 63. [↑](#footnote-ref-61)
62. The s.1(2) list of treaties may of course be directly amended by statute as well – e.g. s.2 of the European Union (Amendment) Act 2008 adds the Treaty of Lisbon to the list. [↑](#footnote-ref-62)
63. *Miller*, para. 98. The argument about double taxation treaties was prominently advanced in J. Finnis, “Terminating Treaty-based UK Rights”, *Judicial Power Project* (26 October 2016); also J. Finnis, “Terminating Treaty-based UK Rights: A Supplementary Note”, *Judicial Power Project* (2 November 2016). [↑](#footnote-ref-63)
64. *Miller*, para. 61 (emphasis added). [↑](#footnote-ref-64)
65. “Explanatory Memorandum to the Railways (Convention on International Carriage by Rail) Regulations 2005”, *http://www.legislation.gov.uk/uksi/2005/2092/pdfs/uksiem\_20052092\_en.pdf* [Accessed 1 October 2018] (emphasis in the original; footnote omitted). [↑](#footnote-ref-65)
66. E.g. Case C-267/91 *Keck and Mithouard* [1993] (certain selling arrangements); Case C-110/05 *Commission v Italy* [2009] (product use). [↑](#footnote-ref-66)
67. Application no. 5856/72 (25 April 1978), para. 31. [↑](#footnote-ref-67)
68. Qualified majority voting replaced unanimity in Council decision-making in existing areas of competence such as the free movement of capital and the freedom to provide services. See further “Developments up to the Single European Act”, *http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\_1.1.2.html* [Accessed 1 October 2018]. [↑](#footnote-ref-68)
69. Emphasis in the original. [↑](#footnote-ref-69)
70. Article 33 of COTIF is entitled “Modification of the Convention” and lays down amendment procedures. See also Sch.6 para.3(2) of the Railways and Transport Safety Act 2003: “the regulations may … provide for a reference to the Convention to be treated following modification (whether occurring before or after the reference first takes effect) as a reference to the Convention as modified”. [↑](#footnote-ref-70)
71. It also rejected the suggestion that EU law was delegated legislation: “The 1972 Act cannot be said to constitute EU legislative institutions the delegates of Parliament: they make laws *independently* of Parliament” in *Miller*, para. 68 (emphasis added). [↑](#footnote-ref-71)
72. *Miller*, para. 228. [↑](#footnote-ref-72)
73. Grant, “Prerogative, Parliament and Creative Constitutional Adjudication”, at p.50. [↑](#footnote-ref-73)
74. *Miller*, para. 60. And see e.g. para. 66 regarding the reception of the EU doctrine of supremacy: “EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it. That is clear from the second part of section 2(4) of the 1972 Act and *Factortame Ltd (No 2)* [1991] 1 AC 603”. [↑](#footnote-ref-74)
75. E.g. Case C-6/64 *Costa v E.N.E.L* [1964]; Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1979]. [↑](#footnote-ref-75)
76. And not just in the UK – e.g. the well-known *Solange* case law in the German Federal Constitutional Court. [↑](#footnote-ref-76)
77. [1979] I.C.R. 785 at 789 (Court of Appeal). [↑](#footnote-ref-77)
78. Ekins, “Constitutional Practice and Principle”, at p.349. [↑](#footnote-ref-78)
79. *R (HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3 at paras. 206-208. [↑](#footnote-ref-79)
80. Ibid at para. 206. The judgment in *HS2* suggests that the requirements of constitutional statutes may be more or less weighty vis-à-vis each other. But this also gives rise to the thought that requirements of *ordinary* statutes may be more or less weighty vis-à-vis each other, and vis-à-vis constitutional statutes. I explore this matter in other work. [↑](#footnote-ref-80)
81. *Miller*, para. 67. [↑](#footnote-ref-81)
82. “Railways and Transport Safety Bill, Standing Committee D, Thursday 6 March 2003 (Afternoon)”, *https://publications.parliament.uk/pa/cm200203/cmstand/d/st030306/pm/30306s03.htm* [Accessed 1 October 2018]. The quoted response was from Mr. David Jamieson, Parliamentary Under-Secretary of State for Transport, regarding proposed amendment No. 52 that sought to do away with the Regulations’ capacity to disapply or modify the effect of enactments. The Minister also stated: “Without those powers, which, as I said, are limited to the purpose of giving effect to the convention in the United Kingdom, the domestic implementation of the convention would be frustrated”. [↑](#footnote-ref-82)
83. And even when accounting for certain qualifications to EU law’s “overriding” status that we sketched earlier. [↑](#footnote-ref-83)
84. *Miller*, para. 78 (emphasis added). [↑](#footnote-ref-84)
85. *Miller*, para. 81 (emphasis added). [↑](#footnote-ref-85)
86. *Miller*, para. 82 (emphasis added). [↑](#footnote-ref-86)
87. E.g. Dindjer, “Sources of Law and Fundamental Constitutional Change”, *https://ukconstitutionallaw.org/2017/01/27/hasan-dindjer-sources-of-law-and-fundamental-constitutional-change/* [Accessed 1 October 2018]; Elliott, “The Supreme Court’s Judgment in *Miller*”, at pp.263-268. [↑](#footnote-ref-87)
88. Elliott, “The Supreme Court’s Judgment in *Miller*”, at p.265. [↑](#footnote-ref-88)
89. C. Mac Amhlaigh, “*Miller*: the prerogative and constitutional change” (2017) Edinburgh Law Review 448 at p.450. [↑](#footnote-ref-89)
90. *Miller*, para. 83. [↑](#footnote-ref-90)
91. This differs from other readings that instead take the major change argument as the governing idea in *Miller*. See e.g. Arabella Lang, “Parliament’s role in ratifying treaties”, *House of Commons Library*, Briefing Paper Number 5855 (17 February 2017), at p.6 which appears to treat the notion that “the Government cannot make or withdraw from a treaty that amounts to a ‘major change to UK constitutional arrangements’ without an Act of Parliament” as the governing principle that the Supreme Court applied to the facts and the sources question in *Miller*. Note also Elliott, “The Supreme Court’s Judgment in *Miller*”, at p.273, canvassing the idea that the majority’s analysis of sources is “little more than a version of” the major change argument. [↑](#footnote-ref-91)
92. *Miller*, para. 78. [↑](#footnote-ref-92)
93. This is a problem for critics such as Elliott, “The Supreme Court’s Judgment in *Miller*”, at pp.263-268. [↑](#footnote-ref-93)
94. Warm thanks to David Feldman for the reminder. [↑](#footnote-ref-94)
95. Lord Mance, “International Law in the UK Supreme Court”, King’s College, London, 13 February 2017, para. 33, *https://www.supremecourt.uk/docs/speech-170213.pdf* [Accessed 1 October 2018]. [↑](#footnote-ref-95)
96. *Miller*, para. 87. [↑](#footnote-ref-96)