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The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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LAWFUL POWER

Timothy Endicott*

This is the edited text of the 2016 Robin Cooke Lecture, delivered at Victoria University of Wellington on 15 December 2016.

It is a popular idea that public agencies (or perhaps only executive agencies) cannot lawfully do anything unless it is positively authorised by law. Through a discussion of the prerogatives of the Crown, of Parliament and of the courts in the United Kingdom, I argue to the contrary. Public bodies may legitimately do anything that serves the purposes for which they exist, unless it is prohibited by law. Such actions are exercises of lawful power, insofar as they are not unlawful. The Lecture discusses the English High Court's ruling in the case of R (on the application of Miller and another) v Secretary of State for Exiting the European Union. *An epilogue explains the Supreme Court decision in Mrs Miller's case and its bearing on the topic of the Lecture.*

I INTRODUCTION

This is such a spectacular planet, more spectacular than I knew before I flew into Wellington, and the plane wheeled and banked past the beautiful Marlborough Sounds across the water from your city. I am delighted to be here and honoured to give a lecture named for the great Sir Robin Cooke. I am very pleased that Francis Cooke and Lady Cooke can be here and anxious of course as to what Francis and other constitutional lawyers in the room may think of what I have to say to you. Some of you will not be constitutional lawyers and I will try to talk to you. I will not set the bar at the impossible height of persuading the constitutional lawyers.

I want to defend the view that courts, legislatures and executive bodies may assume power that has not been conferred on them by any authoritative source and that the law ought to recognise such power as lawful when it serves the public purposes for which those bodies exist and when its exercise does not violate any rule of law. That is a *positive conception* of public power. I will defend it against the *negative conception*: the view that institutions of government have *no* lawful power unless it is

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conferred on them by the law. Here is a striking expression of the negative conception of public power, by Laws J, as he was in 1995, a British judge who is a leading authority in constitutional law:[1]

> For private persons, the rule is that you may do anything you choose which the law does not prohibit … But for public bodies the rule is opposite … any action to be taken must be justified by positive law.

There is no way to disagree a little bit with the part about public bodies – I am going to disagree wholesale and say that a public body may lawfully do anything that legitimately serves the purposes for which it exists, unless the law prohibits it. Executive, legislative and judicial agencies of government may legitimately exercise power that is not conferred on them by the law and when they do so, the exercise of that power ought to be acknowledged as not unlawful or, equivalently, as lawful.

The invitation to give the Robin Cooke Lecture inspired me to work on this idea because I like to live dangerously. I got to thinking what Sir Robin Cooke would think about it. And then, in October 2016, Gina Miller brought her claim that the United Kingdom Government did not have power to trigger the United Kingdom's withdrawal from the European Union without an Act of Parliament. A three-judge Divisional Court of the High Court unanimously upheld her claim in November 2016.[2] The case raises a new and fascinating problem concerning the sources of power in a constitution and I cannot resist focusing on it.

Here is how I will proceed: I will tell you the story of Gina Miller's case, even though some of you are already familiar with it and some of you have written about it. I will argue that the case ought to be decided in light of the purposes for which the executive has power. And that is challenging in the United Kingdom, a country that manages to combine very effective, democratic executive government, with an 800-year tradition of thinking of executive power only negatively – as something to be taken away. On the positive approach, executive power is not simply something that the British have never quite got around to eliminating. It is not a power that needs specific legal authorisation – specific legal authorisations of executive action can be a good idea or a bad idea. There are good

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1 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) [*Fewings* (QB)] at 524. Proponents of the negative conception have included Bingham LJ in the appeal from Laws J's decision in *R v Somerset County Council, ex parte Fewings* [1995] 3 All ER 20 (CA) at 25; Adam Tomkins *Public Law* (Oxford University Press, Oxford, 2003) at 78; and Paul Craig (see the paper he wrote for the Constitution Committee in its report House of Lords Select Committee on the Constitution "Relations between the Executive, the Judiciary and Parliament: Report with Evidence" (The Stationery Office Limited, HL Paper 151, July 2007) at 98). In New Zealand, see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 652–658, advancing a theory that "all public action must be positively authorised by law". See also Campbell McLachlan *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014).

2 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2016] WLR(D) 564 [*Miller* (HC)].

reasons of constitutional principle for executive power and where its exercise is legitimate, it ought to be accepted as lawful, without any legal authorisation.

I will then defend the positive approach in relation to *each of the other branches* of the state. The executive, Parliament and the courts can all lawfully exercise power not conferred by law. You may well ask how an exercise of power can be lawful if the power was not conferred by the law, and I will answer that.

I am going to tell you some things that I think to be undeniably true about how a Westminster-style parliamentary system – and specifically the British system – can achieve responsible government, and yet I will be defending views that are deeply controversial in New Zealand and in the United Kingdom. My second claim (after the claim that public bodies may lawfully exercise power that is not conferred upon them by law) is that a constitution can function and can achieve conspicuous success over centuries, with an extravagant open-endedness in its fundamental principles and with no consensus on crucial questions as to how to achieve responsible government.

Just to provoke, I will speak of prerogatives of the executive, prerogatives of Parliament and prerogatives of the courts. Constitutional lawyers usually keep "prerogative" as a term for certain powers of the Crown – the ones that look constitutionally objectionable to the various claimants in Gina Miller's case and to many constitutional lawyers. The American satirist Ambrose Bierce wrote in his *Devil's Dictionary* that prerogative is a "sovereign's right to do wrong".[3] I am afraid that many in the United Kingdom would take him seriously and regard the prerogative as necessarily illegitimate. It is a widespread attitude: that prerogatives of the Crown are bad things that ought to be taken away and that the good things in the constitution are the limits on prerogative.

But of course, Bierce was joking. John Locke was right: "prerogative is nothing but the power of doing public good without a rule".[4] Like any power, it can be abused. But it is good that public bodies have it. I think that the executive, Parliament and the courts can all assume power to do public good without a rule. They have all done so over the centuries. And it can be lawful power.

II GINA MILLER'S CASE

The *Miller* case is simple. The context is complex and the reasons why constitutional experts disagree about the case are complex. The Lisbon Treaty (the Treaty of European Union 2007) provides in art 50 that any "Member State may decide to withdraw from the Union in accordance with its own constitutional requirements" and that a "Member State which decides to withdraw shall notify the

3 "Prerogative" in Ambrose Bierce *The Devil's Dictionary* (Dover Publications, Dover, 1993).

4 John Locke "The First Treatise of Government" in Peter Laslett (ed) *Locke: Two Treatises of Government* (3rd ed, Cambridge University Press, Cambridge, 1988) 141 at § 166.

European Council of its intention".[5] When she became Prime Minister in July 2016, Theresa May committed her Government to notifying the European Council of the United Kingdom's intention to withdraw. It was presumed in the litigation that a notification under art 50 is irrevocable, so that it will lead inevitably to the termination of the United Kingdom's membership in the European Union.[6]

Mrs Miller claimed that Mrs May could not lawfully use the royal prerogative to give notification under art 50. Mrs Miller argued that, by enacting the European Communities Act 1972 (UK), which gave effect to European Union law in the United Kingdom, Parliament conferred rights under European Union law on her and the other claimants (and on everyone in the United Kingdom and on many overseas). Mrs Miller argued that the Government has no lawful power to use the prerogative to terminate rights conferred by statute.

Her counsel cited the *Case of Proclamations*, in which an earlier avatar of Lord Cooke of Thorndon, Sir Edward Coke, told King James I in 1610 that he could not depart from the law of the land by proclamation:[7]

> … the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm.

You see, I told you that it is simple. Clear and undoubted since 1610. And if you read the High Court decision, it will certainly sound as if it is obvious: Theresa May has no power to take away rights that Parliament gave to the people of the United Kingdom.

But in fact, the argument as put, and as accepted in the High Court, is based on a fallacy. The true rule is that the Government cannot act *contrary to statute*. The Government does not act contrary to

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5 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community OJ C306/1 (opened for signature 13 December 2007, entered into force 1 December 2009), art 50.

6 *Miller* (HC), above n 2, at [10]. But, for an argument that the United Kingdom could unilaterally revoke its notification under art 50, see Paul Craig "Brexit: Foundational Constitutional and Interpretive Principles: II" (28 October 2016) Oxford Human Rights Hub: A global perspective on human rights <ohrh.law.ox.ac.uk>. It seems to me that it would have been wrong for the High Court to reject Mrs Miller's claim simply on the basis that a notification under art 50 could be revoked. The gist of Mrs Miller's argument was that an Act of Parliament was required to authorise the termination of the United Kingdom's membership in the European Union, and it was timely for the Court to consider that argument before the triggering of art 50.

7 *Case of Proclamations* (1611) 12 Co Rep 74. Coke cited John Fortescue's work of about 1470 (see John Fortescue *De Laudibus Angliæ Legum* (translated ed: Francis Gregor (translator) *De Laudibus Legum Angliæ: By Sir John Fortescue, Lord Chief Justice, and afterwards Lord Chancellor to King Henry VI. Translated into English* (T Evans, London, 1775)) at ch 9. That passage is at the centre of Fortescue's argument that the English kingship is "not only regal, but political" ("*nedum Regali, sed et Politico*"), by which he meant that the King had no lawful authority to impose taxes without consent of Parliament; if it was actually intended as a statement of law, it is an attractive scholarly authority (offered without any binding legal authority) for the decision in the *Case of Proclamations*.

a statute if it terminates a treaty, after a statute of Parliament has provided that rights arising under a treaty are to have effect in United Kingdom law. It is only a fallacy to say, as Mrs Miller's lawyers said, that the Government would be acting contrary to the sovereignty of Parliament if it triggered art 50.

In the *Case of Proclamations*, King James I had started charging fees for building permits in London, on grounds of good order (and incidentally, I am sorry to say, because Parliament would not give him the revenue he wanted). The King's regulatory and revenue purposes were undoubtedly purposes to be pursued *in Parliament*, and the right to hold onto your money when you put up a building on your land (instead of giving it to the King in payment for a permit) was a common law right that could not be changed without legislation. Sir Edward Coke had the gumption to say so to a tyrant.

In Mrs Miller's case, by contrast, the Government had in mind to exercise its ordinary authority over a treaty. Yet the High Court accepted the claimants' "principal contention" that the *Case of Proclamations* was authority for the proposition that the Crown could not trigger art 50 by exercise of the prerogative.[8]

As Lord Millett has recently pointed out, there is no rule that an act of prerogative cannot take away rights. Lord Haw-Haw was hanged for treason, after World War II, as a result of the prerogative decision to go to war with Germany. The British Government certainly did not have the power to make someone liable to capital punishment by proclamation. However, its conduct in foreign affairs had a result that made his action criminal.[9] Lord Millett said:[10]

> This demonstrates an important fact: that where a provision of domestic law depends on the continuance of a particular relationship with another state, a change in that relationship may be effected by the exercise of the Royal Prerogative without the need for legislation.

The High Court in *Miller* relied on the restatement of the *Case of Proclamations* principle in the famous 1916 case of *The Zamora*:[11]

> No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity.

But the *Zamora* principle is perfectly empty for the purpose of the *Miller* case, just as it would have given Lord Haw-Haw no defence to his prosecution. The *Zamora* principle means that the

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8 *Miller* (HC), above n 2, at [95]–[96].

9 See *Joyce v DPP* [1946] AC 347 (HL).

10 Lord Millett "Prerogative Power and Article 50 of the Lisbon Treaty" (2016) 7 UK Supreme Court Yearbook 190 at 192.

11 *The Zamora* [1916] 2 AC 77 (PC) at 90. See also *Miller* (HC), above n 2, at [81] and [89].

government cannot alter the law that gives effect to the treaty. This is why the Government cannot deprive European Union law of effect, while the United Kingdom is a member state and the European Communities Act 1972 (UK) is in force. But that does not mean that the Government cannot take action under the Lisbon Treaty that would result in the United Kingdom ceasing to be a member state of the European Union. The use of the *Zamora* principle to conclude that the Crown cannot terminate a treaty once Parliament has given effect to it involves the same fallacy as reliance on the *Case of Proclamations* to justify the decision in *Miller*.

But here is a possible rationale for the High Court's decision in *Miller*, which distinguishes the case from Lord Haw-Haw's: you may think that it is so constitutionally inappropriate for the government to take an action under the royal prerogative – action that will have the massive constitutional consequence of terminating the United Kingdom's membership in the European Union – that the Court ought to take away the prerogative, in this respect, from the British Government. *That*, in my view, is not a fallacy; it is an arguable proposition. Of course, it is not what Mrs Miller's counsel argued: they did not want to ask the judges to change the law that gives the Government authority to represent the United Kingdom in treaty relations. But I think it is a fair argument; let me explain why I think that it does not succeed.

The question in issue (whether to trigger art 50) certainly does have massive constitutional importance. And still, it is so clearly and patently a matter of whether and how to instigate a negotiation between the United Kingdom and a supranational organisation that it falls squarely under the rationale for the executive's authority over treaties. There is nothing *legislative* about writing to the European Council. And although Parliament has many functions that are executive in nature (such as the executive function of the House of Commons in forcing the resignation of a government by a vote of no confidence), the justification of those executive functions of the legislature depends on the capacity of Parliament to secure responsible government. And the process of passing legislation in Parliament has nothing to offer by way of making the decision to trigger art 50 more responsible.

Here is the practical effect of the Court's decision: in place of its role of scrutinising the Government and holding it to account for its policy and conduct concerning Brexit (a role in which both Houses had already been heavily engaged before the litigation), Parliament must legislate. That change will, first, turn the debates in the House of Commons over the Government's approach to the forthcoming negotiation into debates over amendments designed by opponents of the Government to restrict the terms on which Theresa May can negotiate with the European Union. And it will, secondly, give the House of Lords a temporary veto over triggering art 50 and an opportunity to propose amendments.

It may seem that this recasting of the political debates over Brexit will be constitutionally productive, in giving the democratic assembly the responsibility to legislate to determine the agenda for the ongoing relationship between Britain and other European countries. But the British Parliament cannot actually legislate for Brexit. Given the axiom of current British politics, accepted by the Conservatives and Labour alike, that effect *must* be given to the slim (52–48 per cent) majority view

expressed in the referendum. The only effect of the High Court's decision is that Parliament will have to authorise the Prime Minister to proceed, leaving her as free to negotiate as if she had used the prerogative to trigger art 50.

You see how different it is from the *Case of Proclamations*, which involved a scheme to raise revenue that King James I could not get by grant of Parliament.

III THE NEGATIVE APPROACH TO PUBLIC POWER

It seems to me that the claimants' fallacious argument in the *Miller* case gets a very appealing aura from the generally negative British attitude to the royal prerogative. Perhaps the phrase "royal prerogative" makes that constitutional power of the executive sound unprincipled? You would think that everyone would know by now that the United Kingdom is *not actually a kingdom* and that the royal prerogative is not actually *royal*. That constant and impressive monarch, Queen Elizabeth II, is not actually a monarch and the power over treaties is exercised by a highly democratic executive. But the argument for the claimants in the *Miller* case proceeds as if Queen Elizabeth II were King James I – a tyrant threatening Sir Edward Coke with his fists – so that allowing the Crown to trigger art 50 would commit the constitutional future into the hands of an arbitrary despot.

This absurd idea is deeply rooted in 21st century British political and legal thought. Gordon Brown's Government conducted a review of the prerogative and published a Green Paper in 2007 that spoke as if the prerogative were a regrettable blot from the past:[12]

> For centuries the executive has, in certain areas, been able to exercise authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted. This is no longer appropriate in a modern democracy. The Government believes that the executive should draw its powers from the people, through Parliament.

That attitude is the legacy of a history in which no one has taken much thought for the reasons why the Crown ought to have any power at all. There have been honourable exceptions such as John Locke and William Blackstone and less honourable exceptions such as King James I and King Charles I.[13] But the barons at Runnymede in 1215 did not think about what the King *ought* to be able to do; neither did the great Sir Edward Coke in the 17th century. For the purposes of the barons and of Coke, the authority of the monarch went without saying and they could focus all their attention and all their constitution-making energy on its limits, on enforcing the limits and on enforcing them in a way that

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12 Ministry of Justice *The Governance of Britain* (CM 7170, July 2007) at [14].

13 See John Locke "The Second Treatise of Government" in Peter Laslett (ed) *Locke: Two Treatises of Government* (3rd ed, Cambridge University Press, Cambridge, 1988) 267 at §§ 159–168. On the development of thinking about legal power in foreign relations from Locke onward, see McLachlan, above n 1, at 31; and William Blackstone *Commentaries on the Laws of England: Book 1: Of the Rights of Persons 1765–69* in Simon Stern (ed) (Oxford University Press, Oxford, 2016) 83 at 162.

amounted to imposing new limits. Sir Edward only spoke out on the reasons why it was not *lèse-majesté* for him to point out (or to change) the limits.

In fact, there has been a huge structural change, partly through the ultimate accomplishment of Coke's reform agenda in the Glorious Revolution, but also, very importantly, after the Glorious Revolution, as the revenue arrangement established in the Bill of Rights 1689 made it unworkable for the King to choose his ministers otherwise than by asking himself who could command the confidence of the House of Commons. Perhaps the consequences of this change have not been fully realised? Walter Bagehot saw the consequences, nearly 200 years after the Glorious Revolution, when he pointed out the importance of Cabinet governance in the 1860s.[14] For our purposes, the salient structural transformation since the 1690s is that the Cabinet is, today, not a less democratic body than Parliament; you might say that it is more democratic. Successive kings had to respond to the need for ministers who could get revenue measures through the House of Commons. The development of party politics was driven by the corresponding need for the competing political tendencies to organise the pursuit of their programmes of government in the House of Commons. The United Kingdom gradually underwent a change as important as the Glorious Revolution. It is an arrangement that every Westminster-style democracy has inherited. The executive became accountable to the House of Commons and to the people. The Cabinet is appointed by a democratic process, and is accountable to the people. Most of all, the Prime Minister is accountable to the people. I think it was mere fantasy for the British Government in 2007 to think that giving new forms of control over prerogative to Parliament, and taking power away from the Cabinet, would "ensure that government is more clearly subject to the mandate of the people's representatives".[15]

The great accomplishments of our constitutional transformation have included the development of an independent judiciary with jurisdiction to interfere with unlawful governmental conduct and the development of a democratic Parliament that can scrutinise the conduct of government and that has sovereign legislative authority. But what a mistake it would be to think that those were the only accomplishments, or that they are more important than the transformation from a royal executive to a democratic executive. The *third great constitutional reform* – as great as judicial independence and the development of Parliament – was the allocation of responsibility for the executive functions of the state to ministers who are appointed democratically and are accountable to each other in Cabinet and to the democratic assembly in Parliament, and are deeply vulnerable to the whims of the electors of the House of Commons.

You could read the sophisticated account of constitutional principles in the High Court's judgment in *Miller* and think that there are two important principles: the rule of law and Parliamentary

14 See Walter Bagehot *The English Constitution* (Chapman and Hall, London, 1867) at 12.

15 Stern, above n 13, at §24.

sovereignty.[16] But you will not see the third great constitutional principle: the principle that the administration of government (including the conduct of the United Kingdom in supranational and international relations) ought to be carried out by an effective, democratic executive. Parliamentary sovereignty and the rule of law are, of course, essentially connected with this third great constitutional principle, because it is not enough that the executive is democratically appointed and can be democratically ousted; it is also in the public interest that it should be accountable to the courts for the lawfulness of its conduct of government and accountable to Parliament for all aspects of its conduct and policy. Because there is no reason to think that the United Kingdom will be better governed if the courts take away the Government's authority over treaties, the third great constitutional principle gives reason against the decision in *Miller*.

I will leave the *Miller* case, with the comment that the real threat to responsible government in the Brexit saga has not yet emerged: it is the prospect that the legislation to implement the withdrawal from the European Union will give massive new legislative power over United Kingdom law to the executive.[17]

IV PREROGATIVES OF THE EXECUTIVE

If I have persuaded anyone in the room by this account of the *Miller* case, he or she and I will say that the executive power of the British Government is not a regrettable lapse in constitutionalism. It is *just as truly justified* by constitutional principles as the powers of Parliament and of the courts, and undoubtedly extends to the triggering of art 50. This is the case even though (and, in part, because)

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16 Campbell McLachlan supports this approach, referring to "the two most important elements of the Constitution of the United Kingdom (and cognate countries): the subjection of executive government to the rule of law and the supremacy of Parliament" in Campbell McLachlan "The Foreign Affairs Treaty Prerogative and the Law of the Land" (14 November 2016) UK Constitutional Law Association <www.ukconstitutionallaw.org>. In McLachlan's work, this approach becomes a more articulate way of insisting on a general need for cabining the executive power in foreign affairs, which is not articulated in the High Court decision in *Miller*.

17 The Government's White Paper on the Great Repeal Bill says that it "is crucial that the Government is equipped to make all the necessary corrections to the statute book before we leave the EU", and points out that:

> …the power to enable this correction will need to allow changes to be made to the full body of EU-derived law. This will necessarily include existing primary as well as secondary legislation … This does mean that the power will be wide in terms of the legislation to which it can be used to make changes. Therefore, it is important that the purposes for which the power can be used are limited. Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU.

See Department for Exiting the European Union *Legislating for the United Kingdom's withdrawal from the European Union* (CM 9446, 30 March 2017) at [3.16]. It could turn out well if the executive officials given this power distinguish soundly between measures that do and do not make a policy change not arising out of Brexit and/or if Parliament gives unusually acute scrutiny to a colossal volume of statutory instruments.

the executive is subordinate to Parliament and subject to the authority of the courts. The sovereignty of Parliament does not mean that Parliament must exercise all power; it means that Parliament can decide what to do and, in particular, it means that Parliament can decide for the future how power is to be allocated.

But perhaps even those of you who are unconvinced can agree, at least, that we need executive power. As Sales LJ – one of the three judges in the High Court in *Miller* – has written extrajudicially:[18]

> If Parliament simply abolished the Crown's prerogative and common law powers, the probability is that it would have to re-invent them or something very like them in the form of reserve governmental powers of great width conferred by statute.

That probability would be a constitutional necessity, because of the third great constitutional principle. And replacing the prerogative with statutory powers of great width would not necessarily be an improvement. These obvious facts support the claims that, you will remember, I want to defend. These are that courts, legislatures and executive bodies may legitimately exercise power that has not been conferred on them by any authoritative source and that the law ought to recognise such power as lawful when it serves the public purposes for which those bodies exist and when its exercise does not violate any rule of law. I do not think it matters that a statutory power of great width would have a clearly discernible source in statute, while it is really rather unclear whether certain major elements of state power in the United Kingdom even have a source.

What is a source? In the case of a power (as with any other normative relation), a source is a fact that makes it the case that the power exists. A statute can be the source of a power. The fact that Parliament enacted that the Secretary of State could vary the classes of exempt hunting under the Hunting Act 2004 makes it the case that the Secretary of State has the power to vary the classes of exempt hunting.[19] The Act is the source of the Secretary of State's power (an explanation of the existence of the power might go further, by explaining what makes it the case that Parliament has power to confer such a power by enactment).

Prerogative, by contrast with statute, is not a source. Prerogative is a category of power. What is the source of prerogative power? What fact makes it the case that the Crown has it? It is popular to say that its source is the common law. It is certainly a true proposition of the common law that the Crown has the power, but we should be careful to avoid a mistake that commonly arises from the lawyer's tendency to think of the common law as law made by judges. Like many doctrines of the common law, the prerogative was not made by judges. On the contrary, the judges were made by exercise of the prerogative and they have their power today by virtue of the prerogative of the Crown.

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18 Philip Sales "Crown Powers, the Royal Prerogative and Fundamental Rights" in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 361 at 373.

19 Hunting Act 2004 (UK), s 2.

They also have jurisdiction to decide disputes over the prerogative. But that does not mean that they invented the prerogative.

The source today of the prerogative in international affairs – the fact that makes it the case that the Crown has prerogative power – is a complex pattern of practices in government (including practices of the courts and of Parliament) from day to day in the 21st century. It is rooted in the evolving form of government that goes back – by way of the restoration of the monarchy after the English Civil War – to the pre-Norman tradition. It is entirely true to say that the prerogative is a matter of common law, as long as you get your understanding of the common law right: the judges did not make the prerogative and they are not making it today. They are bound by the common law not to disregard it. It is common law in the sense that it is part of the law that binds the whole realm in common (and it binds the judges, and was not made by the judges). And then, the common law is not really its source, because it is a matter of common law only in the sense in which the common law is not a source.[20]

V PREROGATIVES OF PARLIAMENT

Remember, I want to say that public bodies may legitimately exercise power that is not conferred on them by the law. When it comes to Parliament, you may be thinking, I will hit a wall, because there *is* a legal rule – the doctrine of Parliamentary sovereignty – that confers power on Parliament to enact everything that it enacts. So, everything Parliament does is authorised by law (the law of the constitution).

Well, that only makes my point. My point is to contest Laws J's view that "for public bodies … any action … must be justified by positive law."[21] That negative conception of public power – the idea that a public body has no lawful power except what the law specifically confers – becomes meaningless in application to Parliament. Perhaps Laws J and the other proponents of the negative conception really only have in mind *executive* bodies, rather than public bodies in general. For the

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20 Note that much of what I say about executive power in this Lecture is in sympathy with the work of Bruce Harris on a "third source" (besides statute and prerogative) of executive power. Perhaps I am arguing that the source of prerogative power, insofar as it has one, is the same as the source of the executive powers that Harris and others do not classify as prerogative, insofar as they have a source. But I do not think that the "residual freedom" that Harris calls "the third source" is a source (it is a category of power), which is why I do not use Harris's evocative term. The actions that he calls "third source" actions are instances of acts that, according to the argument of the Lecture, executive agencies can lawfully undertake without having had the power to do so conferred on them by any source. See BV Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; and BV Harris "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373. See also Adam Perry "The Crown's Administrative Powers" (2015) 131 LQR 652 at 672. Mark Elliott has found Harris's reasoning "compelling" in Mark Elliot "Muddled thinking in the Supreme Court on the 'third source' of governmental authority" (23 July 2013) Public Law for Everyone <www.publiclawforeveryone.com>.

21 *Fewings* (QB), above n 1, at 524.

doctrine of Parliamentary sovereignty does not offer the putative promise of the negative conception, which is to achieve the rule of law by controlling the conferment of power on a public body. The power of Parliament is not ruled by law.

Let us be clear about what the legislative sovereignty of Parliament means. Here is what it does not mean: that for every conceivable enactment, the law authorises Parliament to enact it. That would be unthinkable, intolerable. Imagine a law authorising Parliament to authorise genocide. The United Kingdom has no such law. It would be inhuman. It would be crazy to have a law positively authorising Parliament to make any statute whatsoever. The great constitutional text writers, who have talked as if that were the central rule of the United Kingdom's constitution, have forgotten that the extent of Parliament's power is not unlimited, but unspecified.[22] I think that the actual law-making power of Parliament epitomises the positive conception of public power that I am defending: it allows Parliament to do anything that serves the purposes for which Parliament exists and leaves Parliament free to determine the extent of its own authority.[23]

Sir Robin Cooke contested the idea that Parliament can do anything in the New Zealand Court of Appeal in 1984, in this way:[24]

> I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.

His approach caught on in the United Kingdom and became a trend, although it should go without saying that no judicial decision in the United Kingdom has turned on the point. Let me introduce you briefly to a controversy over it between Lord Steyn and Lord Bingham – both, as it happens, Robin Cooke Lecturers. First Lord Steyn, in the *Jackson* case in 2005:[25]

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22 Pre-eminently, Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, MacMillan, London, 1915) at 3:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament … has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

The first point is unsupported and unsupportable. The second point (that no one is recognised by the law as having a right to override or set aside legislation) is true and important.

23 The doctrine does not allow Parliament to bind itself as to the content of future legislation; that doctrine is compatible with (though not required by) Parliament's plenary legislative authority.

24 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398. See also Robin Cooke "Fundamentals" [1988] NZLJ 158; and Robin Cooke "The Myth of Sovereignty" (2005) 3 NZJPIL 39 at 44.

25 *Regina (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [102] per Lord Steyn (emphasis in original). Compare Lord Hope at [106], [107] and [126]:

> … the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle … In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

And now Lord Bingham, in his book *The Rule of Law*:[26]

> I cannot for my part accept that my colleagues' observations [Lord Steyn and Lord Hope in *Jackson*] are correct. It is true of course that the principle of parliamentary sovereignty cannot without circularity be ascribed to statute … But it does not follow that the principle must be a creature of the judge-made common law which the judges can alter.

I agree with Lord Bingham. United Kingdom constitutional law authorises no one to overrule an Act of Parliament. And that, in my view, is not crazy, it is sensible. Here I am certainly disagreeing with Lord Steyn and *perhaps* with Lord Cooke, too.

The important point for present purposes is that the law on Parliament's law-making power is the ultimate unspecific rule. It makes sense to say that the Hunting Act conferred authority on the Secretary of State to vary the list of exempt animals; I think it is patently false to say that for every conceivable law, a rule of the constitution authorises Parliament to enact that law. The constitution, instead, does not positively determine the authority of Parliament at all, but leaves it to Parliament to determine.

In respect of Parliament, our constitution does not meet, and does not need to meet, Laws J's putative principle that "for public bodies … any action … must be justified by positive law."[27] As I have explained, I do not think that the law confers absolute power on Parliament. But it does impose a ban on interference by other actors or institutions. In Lord Cooke's nightmare scenario – authorisation of torture – or Lord Steyn's nightmare scenario – abolition of judicial review, which Lord Steyn seems to have considered worse than torture – would judges have power to nullify or to disapply a statute?[28] The law-making power of Parliament is, as Lord Steyn suggests, a common law rule. But with respect, it is very misleading to call it a "construct" of the common law. Like the rule that gives prerogative power to the Crown, it is a rule of the common law not in the sense that judges

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> … the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality … The principle of parliamentary sovereignty … in the absence of higher authority, has been created by the common law.

26 Tom Bingham *The Rule of Law* (Penguin Press, London, 2010) at 167 and 170.

27 *Fewings* (QB), above n 1, at 524.

28 Which is not as extravagant as it may sound, since an abolition of judicial review (depending on its form) might have the effect of giving executive officials legal impunity for torture.

made it, but just in the sense that it is part of the law common to the whole realm, which British judges are duty-bound to apply. As Lord Bingham suggests, the power of Parliament was not conferred on Parliament by judges and the common law gives them no authority to alter it. If we imagine the nightmare scenario, the judges would be faced with a new problem, and if they solved it by declaring a statute null, they would be doing something not authorised by law.

I have not actually contradicted what Lord Cooke said about parliamentary sovereignty; but I am afraid that he would disagree with my actual claim: that the common law does not give authority to judges to disapply or to nullify a statute. But you already know that I do not think that it is generally illegitimate for a public body to do something that is not authorised by law! I have a technical problem with the view that judges ought to strike down a statute in the nightmare scenario. By "technical", I mean that I do not think that that view offers a useful technique for securing responsible government. The problem is not that it would be illegitimate for judges to intervene in the nightmare scenario, but that it would be useless. I do not think the constitution actually loses anything if we proceed on an understanding that judges have no power to nullify statutes, because that power would only be valuable in the nightmare scenario. And in the nightmare scenario, the judges are probably in prison. If they can still get to work in the nightmare scenario and they can make an effective stand against torture, they will be doing public good without a rule. They will be inventing a new *judicial* prerogative.

VI PREROGATIVES OF THE COURTS

Ask generally: what power does the common law give to judges to alter the common law? You see why I prompt you to ask this question: there isn't going to be any definite answer. The law gives "general jurisdiction" to the judges of the High Court of England and Wales. But a general jurisdiction does not confer unlimited power on the judges. Every judge and every advocate knows that the powers of the judges are limited, but no one knows where the limits are. The common law gives the judges much power to alter the common law by overruling previous decisions (the Supreme Court of the United Kingdom can overrule its own previous decisions or any other court's decisions). By the effect it gives to precedents, the common law enables judges to change the law without even intending to do so, because of the legal effect that it gives to their decisions. But does it give them authority to abolish the power of Parliament to levy taxes? Does it give them authority to abolish the doctrine of mens rea in criminal law? To abolish habeas corpus? No, of course not, the common law gives judges no such authority. And there is simply no answer to the question of the bounds of judicial authority to change the common law.

This, I propose, is not a defect in the constitution. The constitution could not be improved by an attempt to specify the power of the judges. Consider some of the particularly striking powers that English judges have taken upon themselves: to interpret statutes, to depart from general rules on grounds of equity, to issue *habeas corpus*, to give judicial review of some exercises of the royal

prerogative.[29] You might say, today, that each of these powers meets Laws J's requirement that for public bodies any action must be justified by positive law, because the judges are giving effect to the common law when they exercise those powers. But the law authorises those things only in the sense that it has become the established practice of the courts to do those things (so that we can think of *the practice* as the source of the power to do them). No one ever authorised the judges to do those things. The judicial assumption of those powers was an exercise of judicial prerogative. In the case of interpreting statutes, departing from general rules on grounds of equity, issuing *habeas corpus* and giving judicial review of some exercises of the royal prerogative, I think that the exercise of prerogative exemplified Locke's definition of prerogative as a power of doing public good without a rule.

VII CONCLUSION

The lawful powers of a public body include not only powers conferred by law, but also powers that the law ought to recognise the public body as having. If I have not persuaded you of this, then our disagreement exemplifies my second claim: that a constitution can proceed and can achieve conspicuous success over centuries, with an extravagant open-endedness in its fundamental principles and with no consensus on crucial questions as to how to achieve responsible government.

How can an exercise of power be lawful, if the power was not conferred by the law? Because "lawful" is a synonym for "not unlawful". And there is no general reason for the prerogatives of courts, of Parliament and of executive agencies to be held to be unlawful. Here, I am contradicting Laws J and I should not finish without setting out three obvious and pressing points about *executive* power that must lie behind his impulse – and the impulse of other leading United Kingdom and New Zealand constitutional lawyers – to imagine a fundamental constitutional imperative that *executive* bodies should do nothing without specific legal authorisation.[30]

The first point is the difference that Laws J referred to: between private persons and public authorities. It is undoubtedly true that public authorities ought to be subjected to forms of accountability for their conduct in general, for their conduct's conformity to the public interest and for its lawfulness in particular. It would be impertinent – and, by the same token, totalitarian – to impose legal accountability on each of us for conformity of our private conduct to the public interest.

The second point is that the reasons for the legal capacities of public bodies are different from the reasons for the legal capacities of natural persons. In supporting a positive conception of public power, I do not mean to say that, because the Crown and other executive bodies are legal persons, they have

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29 On the development of the jurisdiction to interpret statutes, see Jim Evans "Sketch of a Theory of Statutory Interpretation" [2005] NZ L Rev 449; and Jim Evans "A Brief History of Equitable Interpretation in the Common Law Systems" in Jeffrey Goldsworthy and Tom Campbell (eds) *Legal Interpretation in Democratic States* (Ashgate, Aldershot (UK), 2002) 67 at 67.

30 See for example Joseph, above n 1; and McLachlan, above n 1.

the legal capacities of natural persons. They are not natural persons and the legal powers they have are (unlike the legal powers of natural persons) held entirely for public purposes. There are similarities – for example, the capacity to contract very often enables a public body to pursue the purposes for which it exists. But the reasons for treating public bodies (or some of them) as capable of entering into contracts are different from the reasons for treating natural persons (or some of them) as capable of entering into contracts.

The third point is the perennially dangerous capacity of the executive to abuse power (or merely to misuse it) more effectively than the branches of government that do not have guns. We should never relinquish the healthy scepticism of Sir Edward Coke, Lord Camden, William Blackstone and Sir Robin Cooke towards unbridled executive power. Blackstone – say what you like about him – is a model to all of us in his combination of scepticism as to *unbridled* executive power, with appreciation of the value of *bridled* executive power. And in order to maintain a balanced constitution, I think that we should spread our scepticism liberally towards unbridled power on the part of the judges and the legislature, too.

My argument has been that this healthy constitutional scepticism is compatible with the view that, in the right circumstances, all three branches of government may lawfully assume powers that no one has authorised them to assume.

VIII EPILOGUE: WHAT HAPPENED NEXT IN GINA MILLER'S CASE

On 24 January 2017, the Supreme Court of the United Kingdom upheld the High Court's decision in the *Miller* case by an 8–3 majority.[31] It is the first time that all of the Justices have sat to decide a case and they were generously outnumbered by the 58 barristers on the record. I think that it is healthy for British political culture that this pageant of the legal profession yielded a dissent from three of the Justices. It made it harder for the British tabloids to portray the judiciary as engaged in a conspiracy against the people.[32]

And the dissent also has the merit of being right. Lord Carnwath and Lord Hughes agreed with Lord Reed's meticulous account of the effect of the European Communities Act 1972.[33] That account

31 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [*Miller* (SC)].

32 The Daily Mail had gained notoriety for itself the day after the High Court decision by calling the three Judges who decided in favour of Mrs Miller "enemies of the people". See James Slack "Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis" *The Daily Mail* (online ed, London, 4 November 2016).

33 *Miller* (SC), above n 31, at [183]–[187] and [197].

led to a simple, incontrovertible explanation of the principle in the *Case of Proclamations*, restated in *The Zamora*, and to an explanation as to why it did not support Mrs Miller's claim:[34]

> That principle does not … require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU. The Act 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.

The majority barely mentioned the *Case of Proclamations*, and did not present it as support for the decision.[35] The argument had moved on from the High Court decision, where the claimants' principal contention, accepted by the High Court, was that the use of the prerogative to trigger art 50 would violate the principle of the *Case of Proclamations*. In the Supreme Court, the majority stated very clearly that "ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament",[36] and that the Government can lawfully do so even if the action results in citizens losing rights.[37] The crucial point was not that triggering art 50 would have the effect of depriving people of rights, but that it would bring about "a fundamental change in the constitutional arrangements of the United Kingdom".[38]

The result is a novel and extremely vague rule: that the British Government cannot exercise its ordinary authority to terminate a treaty, if doing so would result in a major change in the United Kingdom's constitutional arrangements. No authority is given for this novel rule. Instead, the majority says that this "conclusion appears to us to follow from the ordinary application of basic concepts of constitutional law to the present issue".[39] They also say that it "would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the United Kingdom constitutional arrangements to be brought about by ministerial decision or ministerial action alone".[40]

A large majority of the Supreme Court Justices were evidently moved to their conclusion by a sense that the executive should not be able to do something so constitutionally important. That

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34 At [177].

35 At [44].

36 At [5] and [54].

37 At [53].

38 At [78].

39 At [82]. Their Lordships must have meant basic principles, not concepts, since nothing follows from concepts.

40 At [81].

inarticulate impulse is, I think, a manifestation in 2017 of the long history of the negative conception of executive power.

Two days after the Supreme Court decision, the Government presented a Bill in the House of Commons. It had just one operative provision: "The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."[41]

The Labour Party tabled amendments in the Commons, the most important of which were to require another vote in Parliament on a final deal and to guarantee protection for rights of citizens of other European Union member states currently resident in the United Kingdom. The Government fought off both amendments, the Labour Party supported the Bill and it passed without amendment. The House of Lords passed those two important amendments. But after the Bill returned to the Commons and the Commons rejected the amendments, the House of Lords backed down to avoid the political crisis that would have resulted if they had insisted on the amendments.

The Supreme Court decision, then, resulted in a short delay (the Bill received first reading in the Commons on 26 January 2017 and royal assent on 16 March 2017) and yielded whatever effect the extensive debates may have had on the Government's sense of what is politically possible in its negotiation with the European Union. That may seem a meagre result, arising as it did from the *complete* success of Gina Miller's campaign to force Parliament to legislate when it did not want to do so.

But here is another effect of the decision, which must have been very rewarding to Mrs Miller: it serves as a reminder of the Government's subjection to judicial oversight. There is some value in the reminder in *Miller* that the Government is subject not only to the rule of law, but also to the decisions of the judges, whether the judges get it right or get it wrong.

For judges, we need a special version of the proposition that I defended in the Robin Cooke Lecture. The proposition was that an action of a public body ought to be recognised as lawful when it legitimately serves the public purposes for which the body exists and is not contrary to law. But given the public purposes for which the courts exist, executive agencies should recognise a judicial decision as lawful, even when it is contrary to law. This, I hasten to add, cannot be an *absolutely* general principle, because we can imagine circumstances in which the best way for the executive to respond to a judicial decision would be to detain the judges themselves at gunpoint. We can imagine that because you and I have such *vivid* imaginations. Among the actual cases in which the executive of a country has taken the judges away at gunpoint, I have never heard of a case in which it was justified. Think for a moment about what it would take for an executive official even to justify departing from a judicial decision and you will see how very far-reaching a principle it is, that

41 European Union (Notification of Withdrawal) Act 2017, s 1(1).

executive officials should treat the judges' decisions as valid. It is not overridden by judicial error of law and not even by patent judicial error of law.

This, then, is one of the ironies of the rule of law: it imposes a near-absolute demand that the decisions of certain public bodies (courts) are to be treated as exercises of lawful power, whether or not they accord with the law.

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