

The Stubborn Stain Theory of Executive Power

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From Magna Carta to *Miller*

Timothy Endicott



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Foreword by Professor Sir Ross Cranston FBA



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Abstract

There is attraction in the argument that prevailed in the Supreme Court in Gina Miller’s case, that the royal prerogative could not lawfully be used to commence the United Kingdom’s withdrawal from the European Union. The attraction lies in the view that prerogative power –the constitutional power of the executive– is a stubborn stain that has been partly but not entirely washed out of our constitution. This paper argues against the stubborn stain theory. There are positive reasons of constitutional principle for an efficient, unified and democratic executive. In the British tradition from Magna Carta to *Miller*, executive power has gradually been transferred from the monarch to Parliament, and from the monarch to the judges. The tradition seems to support the idea that executive power is generally bad. But we can only understand the extent of the executive power –and the ways in which it ought to be limited and constrained– if we understand its constitutional value. In particular, we need to understand its value in making the United Kingdom a community, capable of acting as a legal person in international relations.

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Foreword

Neglect of the executive is a notable feature of constitutional scholarship. A consequence is that judges and others are not as well equipped to think about the foundations of the constitution and the balance which ought to obtain between the courts, the executive and Parliament.

There was no avoiding these issues in the *Miller* litigation, which concerned whether the government had the power to trigger Article 50 and thus begin the process of withdrawal from the EU, without express authorisation by Parliament. In reaching its decision the Supreme Court had the advantage of an outpouring of scholarship about the grounds and scope of executive power sparked by the Divisional Court's judgment.

Amongst the most important and distinct of these scholarly works was Professor Timothy Endicott's lecture for Policy Exchange's Judicial Power Project the week before the Supreme Court hearing. The Government relied on the lecture in argument before the Court (first Blackstone, then Endicott). Revised in the aftermath of the Supreme Court's January 2017 judgment, the lecture is now reproduced in these pages. It is a major contribution to the study of the constitution.

The lecture explores the place and rationale of executive power in our constitution, in cases ranging from the *Case of Proclamations* to the recent *Miller* judgments. Professor Endicott illuminates the centrality and significance of what he terms 'the stubborn stain theory of executive power' in our tradition of constitutional scholarship, a theory which he contends has distorted legal analysis. The neglect of the executive in our constitutional theory fuels misunderstanding of its nature and rationale, Endicott argues, with executive action too often viewed with unjustified suspicion.

The balance of the constitution is Endicott's theme. He argues for an even-handed scepticism of public powers coupled with a clear-sighted recognition of the indispensable contribution that the responsible exercise of those powers makes to the common good. He makes clear the strength and continuing promise of the Westminster constitutional settlement.

Beginning with *Miller*, Endicott takes us on a tour through history, seeking to unearth elements of a theory as well as reminding us of the distinctive shape of our constitutional arrangements and recalling their often overlooked merits.

From Magna Carta to Fortescue, on to Coke, Locke, Blackstone, Dicey and twentieth century theory, the lecture offers an education in the history of our constitution and constitutional theory.

Importantly, Endicott articulates principles which warrant recognition alongside parliamentary sovereignty and the rule of law – that the executive is necessary for the public good and that the executive in our constitutional design is responsible.

With characteristic care and restraint, Endicott brings to life the shape, intelligibility and rational appeal of our constitutional scheme. You may not agree with the argument, or with his analysis of *Miller*, but I am sure that you will agree that the lecture greatly advances our constitutional understanding. I warmly commend it to you.

Professor Sir Ross Cranston FBA

Professor of Law in the London School of Economics. Formerly judge of the High Court, Queen's Bench Division, from 2007 to 2017, and MP for Dudley North from 1997 to 2005. Solicitor General from 1998 to 2001.

Introduction

In our constitution's long history of brilliant and disastrous reflection and action, there is a curious gap. Nine hundred and fifty years of thought and practice since the Conquest have yielded no articulate account of the principle or principles that explain and justify the executive power in our constitution.

I will not try to prove this negative hypothesis, that no one has ever given a useful theory of the executive. But I can show you some scenes from the historical pageant that will persuade you that it may be true. These amazing scenes would be comic if they did not involve the violence and terror of a long struggle against *abuse* of the executive power. If by an effort of imaginative reconstruction, we distilled a theory from the things people say, it would be that the executive power of the Crown is a stubborn stain that we have only partly succeeded in washing out of the fabric of the constitution.

And then I will make an argument: the 'stubborn stain' theory is deficient and really damaging. There is a constitutional rationale for the power of the executive in the 21st century. If we do not know what it is there for, we cannot understand the fetters that ought to constrain and do constrain it. And then, we cannot understand the relation between Parliament and the prerogative.

And yet, I am not accusing our forebears in legal and political practice and theory of a failure in constitutionalism. I will argue that executive power has been surprisingly well configured in the UK – not always, but since the development of cabinet government – and that the blind spot in theorizing has coincided with the development of effective and accountable executive power.

What is more, the blind spot in theorizing about executive power is understandable. The lack of any organized account of the constitutional basis for executive power is partly explained by a mere accident of our constitutional history- an accident that has structured the British state. The power of the executive has evolved negatively, by subtraction, through progressive shifts of particular powers: first away from the monarch in person, and lately away from her ministers in their exercise of the prerogative in her name. That process of subtraction has quite reasonably captivated our collective constitutional imagination, and has given the stubborn stain theory some plausibility.

And there are also reasons for the gap in theorizing that are of general importance for understanding executive functions in any constitution. One is, I think, that the essential points are too obvious.

They have largely gone without saying. And another reason is that the power that the executive ought to have cannot be specified very generally, as it depends on conditions of politics and of culture in a particular country at a particular time, and on the country's strengths

and weaknesses and opportunities and threats, and ought to be open-ended, and does not lend itself to theorizing. I am not at all saying that there is no role for constitutional and political theory in justifying or condemning particular executive roles- in war, in law enforcement, in public health policy, in cyberwarfare, etc. Far from it; but the theories that might be helpful need to be specific to particular conditions and to particular problems.

I will argue that even though we have inherited no theory justifying executive power, we *can* actually find in our heritage of constitutional thinking some simple hints that are of great practical import. Those simple elements explain why the executive has a legitimate function that is justifiable in constitutional principle. And they show that the rule of law and Parliamentary sovereignty are not the only principles of our constitution.

Miller

The scenes from the pageant that I will show you and the argument that I will make in favour of executive power are inspired by an instant classic of constitutional law, the *Miller* case. I think, with respect, that the true legal position was set out accurately in the dissenting reasons of Lord Reed (with whom Lord Carnwath and Lord Hughes agreed). As the majority agreed,¹ the Government² has general power to terminate treaties. Contrary to the reasoning of that strong majority of the Court, the prerogative to terminate a treaty undeniably extended (before the Court decided otherwise in *Miller*) to taking an action calculated to terminate Britain's membership in the EU. By the same token, if Article 50 had never been included in the Lisbon Treaty, the Government's power would have extended to negotiating, signing, and ratifying a treaty to terminate the UK's membership in the EU.

As Lord Reed explained, Parliament enacted in the European Communities Act 1972 that rights arising under the treaties were to have effect in UK law. Parliament did not enact that the UK was to be a member of the EU. Rights under EU law depend both on the 1972 Act being in effect, and on the UK being a member state of the EU. The Act is a matter for Parliament, and membership in the EU is a matter for the UK as an actor in international law. The British Government has constitutional authority to act for the UK.³ There was no reason to view the triggering of Article 50 – momentous though it is – as anything other than an act of the UK in international relations, of which the British Government is capable and for which it is responsible.

I think that this understanding of the legal situation is indisputable. The majority Justices gave no authority (there is none) for their decision; instead, they appealed to unidentified 'long-standing and fundamental principle'⁴ and to unidentified 'basic concepts of constitutional law'.⁵

The large majority of the Justices simply shared Gina Miller's sense that Brexit is too constitutionally important for the Government to be in charge of it.

¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [5]; see also [54]. And the prerogative can be used to terminate a treaty even if doing so will deprive people of rights: [53].

² I will use 'Government' with a capital 'G' for the Prime Minister and the other ministers of the Crown.

³ As John Finnis had explained before the Supreme Court heard the case, it is a fallacy to say that, if Parliament has enacted a statute giving effect to rights arising under a treaty, the Government cannot take action that would terminate those rights. John Finnis, 'Terminating Treaty-based UK Rights', Judicial Power Project (26th Oct 2016) (available at <http://judicialpowerproject.org.uk/john-finnis-terminating-treaty-based-uk-rights/>). And as Professor Finnis had also written, the ECA 1972, understood in the context in which it was enacted, is best understood as having given effect to the treaties, rather than as having provided implicitly that the Government could not exercise its authority over treaties in the case of UK membership. John Finnis, 'Brexit and the Balance of Our Constitution', Judicial Power Project (2nd Dec 2016) (available at <http://judicialpowerproject.org.uk/john-finnis-brexit-and-the-balance-of-our-constitution/>), the Sir Thomas More Lecture (Lincoln's Inn, 1st Dec 2016). See Richard Ekins, 'Constitutional Practice and Principle in the Article 50 Litigation' (2017) 133 Law Quarterly Review 347; Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (forthcoming, Cambridge Law Journal 2017).

⁴ *Miller* UKSC [81].

⁵ *Miller* UKSC [82].

You may find yourself in sympathy with that sense – the sense that it should be necessary for Parliament to legislate to authorise something so momentous. My purpose here is not quite to talk you out of that conclusion, although I think that it is a mistake. My purpose is to urge you not to jump to that conclusion from the starting point of the stubborn stain theory.

For the stubborn stain theory undoubtedly supports the majority's inarticulate feeling that the British Government should not have the power to terminate EU Membership. Gina Miller called the authority of the British government in international relations 'This ancient secretive royal prerogative', when she was interviewed on BBC Radio in the week before the hearing in her case.⁶ And she referred to the *Case of Proclamations* (1611) 12 Co Rep 74 to support her view that the Government cannot deprive us of rights to which Parliament had given effect to in the ECA 1972:

This actually goes back to 1610, to Sir Edward Coke. It was ruled at that time that the executive cannot overrule Parliament and diminish rights.⁷

The Justices of the Divisional Court in the *Miller* case accepted that approach to the *Case of Proclamations*.⁸ In their account of our constitution, all of its principles either *restrict* the authority of the Crown, or empower agencies *other than* the Crown (i.e., the courts and Parliament); there is no indication that any principle of the constitution justifies any executive power at all.

If the rule of law and Parliamentary sovereignty are our principles, it can seem as if the royal prerogative is an unprincipled remnant of arbitrary power, waiting to be taken away in a case where, as in *Miller*, there is a matter of constitutional importance at stake. And then the decision seems to take its place in a venerable history of the progressive transfer of power from the autocratic Crown to the democratic Parliament and to the independent courts. If there is no rationale for executive power in our constitution – if it is a regrettable residue of arbitrary medieval despotism – then, you may say, the judges were right to seize the moment to remove a prerogative that they had not had any earlier occasion to remove.

But I will argue that the stubborn stain theory is mistaken, that the picture of the prerogative that arises from the stubborn stain theory is askew, and that there was no constitutional ground for taking this power away from the executive. There is actually no *general* reason to take power away from the executive; the great historical successes in taking power away from the executive have been great for *particular* reasons, and it is equally important not to take away the powers that the executive ought to have. What are those powers? Let us turn to the pageant of our constitutional history for an answer – only to be disappointed, I assure you.⁹

⁶ 'Today' programme, Radio 4.

⁷ *Ib.*

⁸ R (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768.

⁹ As they are not reliable guides to the constitution that we have actually inherited, let me omit the constitutional thinker Charles I, and the constitutional doer Oliver Cromwell. In any case, the Instrument of Government of 1653, under which Cromwell served as Lord Protector, took the nature of executive power for granted, as much as Coke did: 'the exercise of the chief magistracy and the administration of the government over the said countries and dominions, and the people thereof, shall be in the Lord Protector' (Article II).

Magna Carta

The pageant is actually much older than 1215. It is older than King Cnut's Oxford Code of 1018. But let's start with the long list that the barons wrote up in the Runnymede charter of 1215, and that successive kings edited in successive Magna Cartas, of things that the King was *not* meant to do. Within weeks, the Pope adjudged that the Runnymede charter would have been voidable for the duress that the barons subjected him to, if it had not been void as an insult to the authority of the king.

Those judgments would, I submit with respect, have been sound if the Runnymede charter had not (by and large) set out the law as it was well understood to have been long before King John's coronation. The restrictions on his power were established by the custom of the realm. The constitutional importance of the Runnymede charter is *first* in its illustration of the claim of the powerful men of the country to legitimacy in constraining the king to adhere to his duties, and *secondly* in its nature as a detailed list of things that the King could not do. The charter did not set out the legitimate scope of the king's authority. It has been a pattern for an 800-year tradition of presupposing the executive power of the Crown, and then identifying restrictions on it, and establishing techniques for constraining it.

Fortescue

In 1471, John Fortescue (given time to think about things while in France after his patron Henry VI was deposed in the Wars of the Roses) distinguished the *purely regal* authority of an absolute monarch from the *regal and political* authority of what we might call a constitutional monarch. Under purely regal authority, the King's pleasure has the force of law. Regal and political kingship, by contrast, is what England had, or was meant to have.¹⁰ In that form of constitution, the king rules a people after their 'onyng' (their 'one-ing') of themselves into a realm, and he rules 'by suche lawes as thai all wolde assent vnto'.

Fortescue wrote that the French model of kingship was purely regal. The essential difference is that a purely regal king can raise revenue from the commons without their consent. That, he said, was the difference between England and France: in France, as a result of regal rule that was *not* 'political', the commoners were reduced to poverty:

Thai drinken water, thai eaten apples, with brede right browne made of rye; thai eyten no flesshe but yf it be right seldon a lytle larde, or of the entrales and heydes of bestis slayn for the nobles and marchauntes of the land. ...Lo this is the frute of his Jus regale.¹¹

Fortescue favoured the English regal and political model of kingship. His vivid constitutional imagination was focused on how the king is and ought to be constrained, and *not* on determining or justifying the king's proper executive power.

¹⁰ John Fortescue, *The Difference between an Absolute and a Limited Monarchy* (c 1471) C Plummer ed (OUP 1885) p 112.

¹¹ *Ib* pp 114-5.

Coke

When Sir Edward Coke said in the *Case of Prohibitions* that the King could not sit in judgment in person in the law courts, King James was so infuriated that he threatened to strike Coke, who fell on his face in fear, and begged for pity. The vignette is an emblem of the reasons why Coke did not develop a theory of executive power. The power of the King was a matter of awe and fear, to be taken for granted by his judges, to whom it actually meant something to call James ‘his Majesty’.

Coke said fine things about King James – ‘that God had endowed His Majesty with excellent science, and great endowments of nature’¹² – and he was careful to ascribe the King’s disqualification from sitting in person as a judge to the fact that he had not studied law, rather than to its true and essential constitutional ground in the need for a separation of judicial power, to prevent abuse of power by the executive.

In the *Case of Proclamations*,¹³ the Lord Chancellor hinted at a view of the King’s proper power, when he argued that if James could not conduct his get-rich-quick schemes, he ‘would be no more than the Duke of Venice’ (who by that time was a figurehead for an oligarchy¹⁴). But Coke’s holding as to the King’s power was (almost purely¹⁵) negative, outlining what the law prohibited him from doing, and reconciling it with his dignity, but giving no positive account of his authority.

There was simply no call for Coke to explain or to justify the power of the King. It was presumed, unarticulated, and meant to be a mystery, and constitutional progress was made by limiting it in particular ways, rather than by piercing the mystery with an account of its justification and extent.

Locke¹⁶

You would think that John Locke, at least, would give us a theory of the executive. And we do, in fact, get something really valuable and pertinent from his *Second Treatise*. But not a good theory of executive power.

Locke wrote that the legislature’s laws have lasting force, and therefore ‘need a perpetual execution’, and ‘it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force’.¹⁷ Perhaps Locke, a man who was highly sensitive to the misleading charms of words, was himself misled by the word ‘executive’. If we use the word ‘executive’ for a branch of government, it cannot be a branch that merely executes laws; executing laws is a crucial and complex responsibility that is only one fragment of what we need from the executive branch of government.

But very significantly for our purposes, Locke added another power alongside the legislative, judicial, and executive powers. It is ‘the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth’; he invented the word ‘federative’ for it.¹⁸

¹² *Prohibitions del Roy* (1607) 77 ER 1342, 12 Co Rep 64.

¹³ *Case of Proclamations* (1610) 77 ER 1352, 12 Co Rep 74.

¹⁴ ‘...he who had once been the pilot of the ship became little more than an animated figurehead, properly draped and garnished.’ Encyclopedia Britannica 11th ed 1910, volume 8 sv ‘Doge’.

¹⁵ The only actual power he ascribed to the King was that ‘for prevention of offences [he] may by proclamation admonish his subjects that they keep the laws, and do not offend them’, and the proclamation may aggravate an offence. There is one other positive statement, seemingly relating to emergencies, but ungrammatical in the report: ‘the King out of his province, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed’.

¹⁶ You may ask, ‘Where is Thomas Hobbes?’ He certainly talked about the executive functions of governmental officials or ‘public ministers’ (as he called them, although the term applies to judicial officials too). Public ministers may be given power ‘to procure the Execution of Judgements given; to publish the Sovereigns Commands; to suppress Tumults; to apprehend, and imprison Malefactors; and other acts tending to the conservation of the Peace. For every act they do by such Authority, is the act of the Common-wealth...’ (*Leviathan* (1651) Chapter XXIII, Of the Publique Ministers of Sovereign Power). And he gave brief discussions of ambassadors, viceroys, governors, and so on. But Hobbes’s animating concern was so much with his argument for the unity of governmental authority, that he had no interest in explaining the purposes for which public ministers ought to be given executive power or with its proper relation to legislative and judicial power, and he had no doctrine of a proper separation of governmental functions. In *Leviathan*, public ministers (including judges) simply hold all of their powers as employees of the Sovereign. I suppose that the problem in the Miller case, in Hobbes’s terms, would be as to whether Theresa May ought to be recognized by the Supreme Court as the employee of the Sovereign who is lawfully charged with the function of giving notice of the Sovereign’s intention to withdraw from the EU. I do not know if it would be possible to work out what Hobbes ought to have said about the proper role of the executive – had it been his subject. It would certainly take a more arduous imaginative reconstruction of his theory, with all its subtleties and tensions, than I can give.

¹⁷ Locke, *The Second Treatise of Civil Government* 1690 Chapter XII, §144.

¹⁸ *Ib* §147.

And though this federative power in the well or ill management of it be of great moment to the common-wealth, yet it is much less capable to be directed by antecedent, standing, positive laws, than the executive; ...what is to be done in reference to foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the common-wealth.¹⁹

Locke added that because the use of force on behalf of the community is necessary for both the 'executive' and the 'federative' functions, it would be advisable to unify the executive and federative functions under one set of officials.²⁰

From Locke, then, we can take the lessons that the 'federative' power is distinct from the legislative power, and that the power to execute laws is distinct too, and that responsibility for the state's use of force ought to be unified, so that the federative power and the power to execute laws ought to be unified.

But we can learn even more from the failure of his account of executive action. A good theory of executive power would have to account for aspects of government that, like the 'federative' power, depend on people's actions, and the variation of designs and interests, so that they 'must be left in great part to the prudence of those who have the power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth.' Domestic policy formation and policy implementation too, and not only relations with foreigners, involve 'people's actions, and the variation of designs and interests', and must be left 'in great part' to executive officials, subject to the carrying out of truly legislative and judicial functions by Parliament and the courts, and subject to the crucial point that constitutional government may be supported by making the executive and federative officials accountable to the legislature for all of their policy and operations.

In Locke's discussion of the prerogative itself, there is much wisdom, including a hint at this crucial point concerning the open-endedness of the executive responsibility in domestic as well as foreign affairs:

Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require...²¹

But that discussion is clouded by an unpromising suggestion that this executive role arises only because the legislature cannot act swiftly enough in cases of emergency, and that executive action ought to be provisional, pending the legislature's action.

Emergencies are a nice example of the country's need for an executive, but they are not the only example of the diversity of needs that may or may not call for legislation, and that must be met on behalf of the community.

¹⁹ *Ib.*

²⁰ *Ib.* §148.

²¹ *Ib.* Chapter XIV §159.

What is more, where legislation is needed, the legislature will need (because the community will need) an executive decision as to what legislation is to be proposed.

Blackstone

Even William Blackstone in his *Commentaries* in the 1760s took much of the proper extent of executive power for granted. He learned somewhat from Locke, yet he was still treating executive power as a high-falutin' mystery: he wrote that 'the executive part of government' consisted in the exercise of 'those branches of the royal prerogative, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers.'²² But we do get one essential practical detail – Blackstone may have learned it from Locke – concerning the constitutional allocation of executive power:

This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford.²³

His account of executive power is out of date.²⁴ And he exaggerated the necessity for unification in a single person; the monarch had for centuries been exercising executive power in council with ministers who not only advised him but acted for him. And like Locke, he suggested that executive power is needed only because the legislature cannot act quickly enough.

But Blackstone was right about the value of unity, strength and dispatch in the executive function of government (and, in particular, in action on behalf of the UK in international relations).²⁵ That is not only a value of a bygone age; it is essential today. It is a necessity in order for the UK to act as a person in international law. And it is a necessity, in particular, in working out the prospect of departure from the EU. Blackstone's offhand remark is a currently salient reminder that we would not be better governed, if Parliament or the House of Commons were negotiating with the European Union.

Dicey

What about Albert Venn Dicey? To him we owe a large share in the responsibility for the stubborn stain theory. He described the prerogative as '...the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.²⁶ To do the famous constitutional lawyer justice, we should immediately point out that Dicey did not actually *hold* the stubborn stain theory.

By 'arbitrary', he probably meant only that the person who exercises the power (the Queen, or her ministers, as it may be) is the arbiter.

He knew that the British Government was (as it still is) accountable to the House of Commons for exercise of the prerogative.

²² William Blackstone, *Commentaries on the Laws of England* 1765-69, W Prest ed (OUP 2016), Book 1, p 162.

²³ *Ib.*

²⁴ Blackstone took prerogative power to be absolute and unreviewable; today it is not absolute and it is subject to judicial review.

²⁵ In *Miller*, Lord Reed cited Blackstone's reference to unity, strength and dispatch, at [160], and added, 'The value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th.'

And he gave characteristically careful and sensitive accounts of the role of the prerogative, of the role of convention in regulating its use, and of the relation between its exercise and the authority of the House of Commons.

But he ought to have known better. He ought to have foreseen that people would go on for generations citing ‘Dicey’ only for short phrases taken out of context. From his sensitive account, he ought to have foreseen that they would not take a well-informed sense of the constitutional aptness and importance of the prerogative, but only two pejorative misconceptions: that it is a residue, and that it is arbitrary.

Modern times

The 20th and 21st centuries display legacy of this history of thoughtlessness, in which the executive power of the state is spoken of as something to be taken away, and not as something that calls for (and may have) a justification. It is all summed up in the *Miller* decision. The Divisional Court described the prerogative in Dicey’s way, as ‘...the residue of legal authority left in the hands of the Crown’.²⁷ And the Supreme Court began its discussion of the Royal prerogative over treaties by saying ‘The Royal prerogative encompasses the residue of powers which remain vested in the Crown’.²⁸ Both courts cited Lord Reid in *Burmah Oil Co v Lord Advocate* [1965] AC 75, at 101: ‘The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute’.²⁹ The Divisional Court quoted Lord Browne-Wilkinson’s remark in *R v Home Secretary ex p Fire Brigades Union* [1995] 2 AC 513 at 552, that ‘the constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body’ (*Miller* [86]). The Supreme Court outlined a history in which ‘over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed.’³⁰ Both Courts portrayed our constitution as if its success was the subordination of the prerogative power to Parliament and the courts. The Divisional Court offered no justification for the proposition that the Crown should have any power whatsoever. The Supreme Court did offer this one assertion:

There are important areas of governmental activity which, today as in the past, are essential to the effective operation of the state and which are not covered, or at least not completely covered, by statute. Some of them, such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much in modern times as in the past.³¹

It is unusual for judges since Dicey even to suggest that there is a justification for any prerogative power; in *Miller*, they did not explain the justification. And their only explanation as to why the justification does not extend to triggering Article 50 was that triggering Article 50 is too constitutionally important.

²⁷ *Miller* Divisional Court [24].

²⁸ *Miller* Supreme Court [47].

²⁹ *Miller* Divisional Court [24], Supreme Court [47]. [49].

³⁰ *Miller* Supreme Court [41].

³¹ *Miller* Supreme Court [49].

This gap in accounting for executive power can be observed generally in political thought, and not only in judicial deliberation. The Labour Government in 2007 produced a Green Paper on the role of the executive, that supported the stubborn stain theory:

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 continues to exercise a number of powers which were not granted to it by a written constitution, nor by Parliament, but are rather ancient prerogatives of the Crown. These powers derive from arrangements which preceded the 1689 Declaration of Rights and have been accumulated by the government without Parliament or the people having a say.³²

The first point to notice about this manifesto is how deeply it diverges from the constitutionalism of the Parliamentarians who brought about the Glorious Revolution. The grounds have been forgotten for their deliberate choice to accord to the King – subject to the Bill of Rights 1689 – the prerogatives that kings had customarily exercised. The choice itself has been forgotten.

In spite of this unthinking approach to its executive authority, the Government's review of the situation led to some extraordinarily sensible decisions by Prime Minister Gordon Brown: that he should not be choosing Regius Professors in the Universities, or selecting Bishops for the Church of England. But notice the particularity of those healthy withdrawals of power from the Queen's Prime Minister. There are particular reasons for concluding that the Prime Minister is not best placed to exercise those particular powers for the public good, and those sensible decisions do not depend on the proposition that the British Government's constitutional authority 'is no longer appropriate in a modern democracy'. The mistake in the background to the Brown government's review, and woven into the resulting White Paper,³³ was to generalize: as if the holding by the Prime Minister of a power not conferred on him by Parliament were generally disreputable, undemocratic, and illegitimate.

That impulse to generalize – the gist of the stubborn stain theory – is a popular impulse today, at least with regard to those powers that wear the irresponsible-sounding label 'prerogative'. Consider, for example, the work of Dr Andrew Blick and Richard Gordon QC, who wrote in the aftermath of the referendum on EU membership that 'statute is generally a preferable power source to the royal prerogative'.³⁴ They speculated that:

It may be that a new constitutional norm is emerging whereby the prerogative should not be the power source for important governmental activities, including the implementation of significant constitutional (or other) change and that, instead, Parliament should provide the basis.³⁵

³² The Governance of Britain Cm 7170 (2007) pp 14-16.

³³ 'The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report' (Ministry of Justice 2009).

³⁴ Dr Andrew Blick and Richard Gordon QC 'Using the Prerogative for Major Constitutional Change: The United Kingdom Constitution and Article 50 of the Treaty on European Union' The Constitution Society, 19 July 2016, p 17.

That approach to prerogative is supported, as you will have seen from what I have said, by much of the trend and rhetoric of our constitutional history. Is it encouraged by the word ‘royal’, the word ‘prerogative’, and the phrase ‘the Crown’? No doubt for some of our colleagues who pursue it, the stubborn stain theory is actuated by a republican urge, which finds it offensive that real power today should have its theoretical and historical source in a regal heritage (even if it has always been, – since Brutus came here in the aftermath of the Trojan War, according to Fortescue³⁶ – both regal *and political*).

But that approach is prone to discount or to ignore two points of huge constitutional importance. The first is the permanent value – the sheer constitutional necessity – of an efficient and unified executive branch of government. This is not royalism, even though effective executive government is something that the UK has inherited from its royalist history. The second is the possibility – and it is a reality in the British constitution – that the executive branch of government can be a responsible branch of government rather than an arbitrary or despotic branch. These two points are matters of constitutional principle (that is, they are fundamental starting points for reasoning as to how the UK constitution ought to operate): executive power must be effective and unified, and it can be and ought to be exercised responsibly. I will try to articulate these two principles.

First, though, please let me pause to insist that I am not here as an apologist for the executive, or any particular Government, any more or less than for the legislature or the judiciary. In fact, I think that the constitutional theorist’s best attitude is a thoroughgoing, dogged skepticism about rulers in general. All of them. What a blessing to be able to take this attitude, and to live in the UK in a day when judges – like the rest of us – are not on their hands and knees in front of the monarch. Let’s extend the skepticism – a deep doubtfulness as to the wisdom, the understanding of public affairs, and even the good will of our rulers – to the *voters*, exerting power as our rulers in an election or a referendum. Let’s extend it very liberally to the executive, to both houses of Parliament, to local councils, to the European Council, to the United Nations, to the institutions of the WTO, and generally to all our rulers. A people’s governance should be arranged to make room for greatness on the part of rulers, and also to deliver responsible government in the face of stupidity and worse on the part of rulers. It is not a great elegy to the ministers of the Crown when I say that we should only apply the same dogged skepticism to them as to other rulers.

The stubborn stain theory of our constitution risks idolizing the judges and Parliament. That naïvety – it should be needless to say – may be preferable to the naïvety of forgetting the distinctive capacity of the executive branch of government to abuse power with unanimity, strength and dispatch. But let’s not be naïve at all.

With that proviso, here are the two constitutional principles that justify executive power.

35 1b pp 3-4.

36 Above, n 10.

1. The executive is necessary for the public good

In the British constitution, the executive is the primary, general branch of government.³⁷ Its functions are open-ended, with no specific form. The core judicial function (passing judgment on legal claims), and the core legislative functions (passing judgment on proposals for legislation) are specific functions, taking specific forms. The courts and the legislature can close for vacations, but the executive cannot. The executive does not manage the country (no one does). But the executive manages the police and the military. It is the executive that gives effect to the decisions of the courts and the legislature. So it is the executive that is chiefly responsible for the rule of law. In Britain, Parliament can change the constitution, and the courts can determine the law of the constitution, but it is the Government that must uphold the constitution.

These observations may seem banal, but they show the mistake in the seemingly-attractive idea that prerogative power ought generally to be taken away from the British Government. Instead, the constitutional imperatives are – and have been for a thousand years – to make the executive democratic and responsible, and to take away specifically legislative and adjudicative powers that the Crown cannot responsibly discharge.

Responsible government needs an effective agency for making clear, open, prospective, stable, general rules for the community. Responsible government needs an independent and effective agency to resolve disputes over the rules. The *Case of Proclamations* and the *Case of Prohibitions del Roy* were great achievements because they took away *specific* powers that the constitution could not responsibly allocate to the King. It would be crude and incomplete to say that the success of our constitutional separation of powers is that the executive is less powerful than it was in King John's day; a full explanation of that success would point out specifically why the power of judging ought to be trusted to judges who are independent of the executive, and why the people's representatives ought to have conclusive control over the power of legislating (preeminently, legislating to impose taxes).

Legislation is the making of clear, open, prospective, general and stable laws for the regulation of those aspects of the life of the community that ought to be regulated by law. Take taxation as the paradigm. Tax collecting is an executive function. But there is no better example of an aspect of the life of the community that ought to be regulated by clear, open, prospective, general and stable laws. And the power to make those rules had better be separated from the say-so of the tax collectors, and of the King who receives the revenue. This happens to be a driver of our constitutional history: think of Magna Carta, Fortescue's work, and the *Case of Proclamations*: in each case the problem was how to constrain the king's power to raise taxes for wars with France.

The executive function, by contrast, is to get stuff done. To identify problems and to find solutions.

³⁷ No doubt it is possible for an assembly to be the primary, general branch of government in a good constitution, in the right community and in the right circumstances. Perhaps Athens at the end of the fifth century BC was an example. Its peculiarities reflect the difficulties that would arise in communities more like the UK, if an assembly were the primary, general branch of government. Athenian democracy only endured for a few famous decades, and it could only function because the Athenians had an executive council to set the agenda for the assembly, and because they appointed executive officials by lot and by election (making them accountable to the assembly). And it is telling that no other democracy has tried to copy the distinctively Athenian model, with its open-ended facility for citizens to initiate policy proposals and to commence political trials in the assembly.

Executive functions can only really be defined, in fact, as those governmental functions that are not adjudication or legislation. The point of the separation of powers is not to share out power at random so that no one has too much; it is to remove the specifically judicial power from the executive, and to remove the specifically legislative power from the executive.

In our constitution, the appointment of the leadership of the executive is itself an executive function, carried out by the Queen on the basis of party representation in the House of Commons. And then the House of Commons acquires the fundamentally executive role of holding the Government to account, and the *executioner's* role of discharging the government if appropriate. Here is an instance of the massive variety of executive functions: contrast the executive decisions whether Theresa May ought to become Prime Minister, and whether she ought to continue to be Prime Minister, with the executive task of negotiating Britain's departure from the EU. The constitution does about as well as it could do, in my view, by allocating the executive functions of scrutinizing and dismissing the Government to the House of Commons. But imagine allocating negotiation of Brexit to the House of Commons! It doesn't bear thinking about, unless you change the House of Commons into a different sort of body, with an internal separation of powers that would enable someone (the Speaker?!) to act *for* it with unanimity, strength and dispatch.

Walter Bagehot, the terrific journalist of our constitution, thought that we already had such an arrangement: in the 1860s he described the Cabinet as a 'committee' of the House of Commons.³⁸ I think that is a misleading description. The Government does not act *for* the House of Commons; it acts for the Crown – i.e. for the UK – and is accountable to the House of Commons not for its service to the House of Commons, but for its service to the country. Yet you can see Bagehot's point. If responsibility for negotiations with other countries were allocated to the House of Commons, the House of Commons would need to invent such a committee; it would need to invent something like what we already have.

The variety of the affairs that may be involved in adjudication or legislation are unlimited, but the form of action is specific and particular: the passing of judgment on a proposal for legislation, and the passing of judgment on a legal claim or prosecution. But the forms of action by the executive branch of government are diverse. They include legislation (and it is just as important to see the usefulness of delegated legislation, as to see its dangers). The executive functions of the executive branch are *so* various that it needs a variety of separations of power within it: the independence of prosecutors is perhaps the most obviously important instance; aspects of independence for civil servants are also crucial, as are other aspects of independence for central bankers, and separate legal capacities for executive action by local authorities and school boards, and there are many more.

38 Walter Bagehot, *The English Constitution* (originally published 1867; Fontana Press 1993) p 68. Dicey was more accurate when he said simply that the Cabinet is 'indirectly appointed by Parliament'. *Introduction to the Study of the Law of the Constitution*, p 285.

Most importantly, the function of initiating legislation is an executive function.

A large assembly can say yes or no to a proposal for legislation (or can require amendments), and we have two such assemblies. But a large assembly would be poor at deciding on an open-ended horizon of the possibilities for public policy, what is to be proposed. The essential legislative question is whether a proposal for legislation is to be approved. The essential executive question is, ‘what is to be done?’ – to which the right answer may be, ‘propose legislation...’. In our constitution, the executive function of initiating legislation is largely allocated to the Government – not through the prerogative, but through the rules and practices of the House of Commons and the House of Lords. Imagine a constitution designed to separate the legislative power from the executive more categorically than ours. The legislature would have to develop *its own* executive, with ways and means committees and appropriations committees to propose revenue measures and expenditure to the whole legislature. And those executive bodies in the legislature would need to cooperate somehow with the *other* executive (the one in charge of the administration of the departments of government), or constitutional gridlock would result. In any Westminster-style constitution, the executive initiates legislation. Think of any problem that government needs to deal with in the 21st century: whether to ban psychoactive substances with exceptions, say, in order to take action against harms called by legal highs. Now imagine a legislature that had no contact with the police, the Home Office, the National Health Service, or the government’s scientific advisers. Such a legislature could still do the job, but only if it developed institutions and facilities of its own that are surrogates of the Home Office and the National Health Service; and even then, it would need to coordinate with the real Home Office and the real National Health Service.

The executive ought to be constrained (and is constrained in the UK) by the rule of law and Parliamentary sovereignty, and by the forms of constituent power that the courts and Parliament get from our constitution: the courts’ power to determine the extent of executive power, and Parliament’s power to change it. As to those constituent powers, the historical pageant yields clear and definite theories of judicial and legislative power. Those theories generate controversy, of course, but their well-accepted principles are reflected in the discussion of the rule of law and of the sovereignty of Parliament by the Divisional Court and by the majority of the House of Lords in the *Miller* case. A due appreciation of the constitutional importance of the judicial and legislative constraints on the executive may seem to support the stubborn stain theory of executive power. But in fact, we need the executive to have effective power, and it is only *particular* powers that ought to be taken away from the executive (as the powers of judging, of levying taxes, and of appointing professors and bishops have been taken away in the UK). It is well justified in constitutional principle that the Government should have very roughly the range of executive power that it has now, and in particular the

powers that it has under the royal prerogative. There is no general reason to take powers away from the Crown.

At least, as long as we have a framework for the responsible exercise of executive power.

2. The executive in our constitution is responsible

It was a great constitutional accomplishment to take legislative and judicial powers away from the Crown. Making the executive itself into a constitutionally responsible agency (while keeping it unified and effective) was every bit as great an accomplishment.

In Blackstone's time, the House of Commons' control over revenue was already generating a political necessity for the monarch to have ministers who could command the confidence of the House of Commons. By Bagehot's time in the 1860s, we had Cabinet government. In our constitution in 2016 the Government – the agency responsible for the executive branch of government – is itself democratic, in several respects:

1. The Prime Minister is appointed (and can only be reappointed after the next election) through a democratic process.
2. She does not govern alone but as the chair of a Cabinet – an arrangement that enhances democracy by pressuring the Prime Minister to achieve cooperation from a group of the senior leadership of her party. Bagehot pointed out the importance of the Cabinet as the crucial, efficient element in the constitution, and pointed out the constraint it places on executive power.³⁹
3. The Prime Minister and her Cabinet are accountable to their party. This is a crucial aspect of the practical limit on choice of ministers, and an accountability device in itself (which, like any accountability device, depends for its success on the persons to whom the Prime Minister is accountable). It is the accountability device that ended Margaret Thatcher's career as Prime Minister.
4. She and the rest of the Cabinet are accountable to the democratic chamber of Parliament (through its procedures, and also through their absolute need for its confidence). And they are also accountable in different ways to the House of Lords.
5. They are subject to the legislative sovereignty of Parliament, and to the orders of the courts
6. Uniquely, the Government has an opposition! The judges and the legislature have none. We can criticize the judges and Parliament, but no one has an institutionalized constitutional responsibility and opportunity to stand against their policies.⁴⁰

The need for a unified and effective executive, combined with those democratic features of our government, justifies the authority of the British Government in its leadership of the executive in general, and in managing international relations in particular.

The executive is not generally democratic; but the Government really

³⁹ Walter Bagehot, *The English Constitution* (originally published 1867; Fontana Press 1993) p 68-9. One aspect of the constraint is that a Prime Minister is never free to choose ministers willy nilly: 'Between the compulsory list whom he must take, and the impossible list whom he cannot take, a Prime Minister's independent choice in the formation of a Cabinet is not very large; it extends rather to the division of the offices than to the choice of Cabinet Ministers.' *Ib* p 68-9.

⁴⁰ See Grégoire Webber, 'Loyal Opposition and the Political Constitution', *Oxford Journal of Legal Studies* (forthcoming).

is. The Cabinet is more democratic than Parliament, and that is not simply because Parliament includes the House of Lords. This is very plainly obvious, and it baffles me that people talk as if Parliament were more democratic than the British Government, and as if subjection – any form of subjection – of the Government to Parliament makes governance more democratic.

The Cabinet is from one party, Parliament is not. The Government faces an opposition, Parliament does not. The Cabinet is radically and vulnerably exposed to the will of the voters. Its democratic character is not lessened by the fact that its vulnerability depends on the strength of the opposition; that just reflects the fact that the usefulness of any democracy depends on competition for the people's support. If the Conservative Party loses that support, the Cabinet will be out at the next election. The Prime Minister will not be Prime Minister. And she will be out before that – like Margaret Thatcher – if her party gets the sense that she is not going to help them to succeed in the next general election.

This comparison of the democratic credentials of the Government and Parliament may seem flippant, and it is not essential for my purposes; it is enough to say that because the Government is accountable to the House of Commons, they *share* democratic credentials. As Dicey said with great acuity, 'conferring as it does wide discretion on the Cabinet', the prerogative 'immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the State.'⁴¹

It is, I think, misleading and damaging to think of the British Government as something other than the people's representatives. The danger is dilution of the Government's responsibility for executive action. If you view the second Iraq war as a mistake, you should be wary of the propensity for a Government to sail into something like that with a sense of accountability and propriety and constitutionality garnered from approval from the assembly. That war, offered by some to show the value of approval by Parliament for the exercise of the power to go to war,⁴² shows its potential drawback. It may conceivably be better to have a Government that knows that it will in the future be on the hook for executive decisions for which it may be punished by the Commons or the electors, who may judge the Government after the fact, with the savage wisdom of hindsight. I say 'conceivably', because I want to emphasise that there is no general theoretical answer to these questions, and there can be various arrangements for the making of such decisions, and for the holding-to-account of the decision makers. But that variety shows that there is no general principle of constitutionalism, that an executive branch of government should have less rather than more power under the constitution.

⁴¹ *Ib* p 282.

⁴² E.g., by Andrew Blick and Richard Gordon, above n 34, 'Using the Prerogative for Major Constitutional Change', p 14.

Conclusion

In the ‘onynge’ of a people, as Fortescue called it – in their becoming and remaining a community, which is a kind of unity – it tends to be essential to have independent judges. It tends to be essential to have a representative legislature that has some independence from the executive, with authority to bind the executive by legislation. These general truths are given form in the two famous British constitutional principles of the rule of law and the sovereignty of Parliament. And it may be good for the legislature, as an assembly on behalf of the people, to have executive authority to appoint and to dismiss the leadership of the executive, as it does in the United Kingdom.

The stubborn stain theory, with its centuries-old tradition of indiscriminate suggestions that there is something generally wrong with constitutional executive power, is a mistake because there are two further constitutional principles:

1. a unified and effective executive branch is necessary for the public good, and
2. the executive itself can be (and in our constitution, *is*) configured for responsible exercise of power.

If you are concerned that the principles are multiplying and getting out of hand, you could alternatively collect all of the above under one umbrella, for which we can again thank John Locke: ‘all this only for the public good’, as he said of all his reflections on what is to be done in governance.⁴³ The independence of judges and the legislative sovereignty of Parliament and the executive power of the House of Commons over the Cabinet are calculated to secure the public good. So is the constitutional authority of the British government (including what people call the prerogatives of the Crown). The executive has a function that is legitimate, and justifiable in constitutional principle. It is, of course, a function that needs scrutiny and constraint and limits.

We can say all these things, I think, while holding tenaciously to our skepticism about rulers. That skepticism may incline you to think that the purpose of a constitution is to constrain power. But let’s not treat a fragment of the constitution as the whole. The whole purpose of a constitution is to empower and to constrain, as may best enable us to live as a community.

I think that the claimants’ case in *Miller* depended on the stubborn stain theory. I have argued, against that theory, that there is no general reason to take power willy nilly away from the British Government. And there was no specific reason to take the particular constitutional power to trigger Article 50 away from the executive, because the question in issue was so clearly and patently a matter of whether

43 Locke, above n 17, Chapter I §3. Cf Chapter XIV §163: ‘...the end of government being the good of the community.’

and how to instigate a negotiation, and since the process of legislation in Parliament had nothing to offer by way of making that decision more responsible. The decision to trigger Article 50 is very deeply different, in precisely this respect, from King James' decision to charge fees for building in the *Case of Proclamations*. The difference is that Parliament *does* have something to offer that will contribute to responsible decision making as to how to raise revenue for the Government (namely, representation of those who are to be taxed).

Using the royal prerogative to trigger Article 50 would have been entirely consistent with parliamentary sovereignty and with parliamentary democracy. Parliament has an actual and central role in the business of Brexit, and it was already carrying it out, before the *Miller* litigation, through debate and scrutiny in both Houses in a variety of forms, and through the confidence of the Commons in Theresa May's Government. It takes no close familiarity with the political workings of the House of Commons to know that there was no prospect of success for a motion of no confidence, on grounds of

Theresa May's intention to use the prerogative to trigger Article 50. Ironically, some suggested that the fact that Theresa May retained the confidence of the House of Commons, while proposing to trigger Article 50, supports the view that Parliament should make the decision.⁴⁴

But there was no prospect of defeat when the Government proposed the European Union (Notification of Withdrawal) Bill, either, and the *Miller* litigation – a complete vindication of Mrs Miller's view of the constitution – resulted in no practical difference except a delay from January 26, when the Bill received first reading, to 16 March, when it received royal assent.

Fortescue on French food, Coke flat on his face, Dicey and everyone else talking about the crucial power of our Government as if some bleach in the wash would finally remove the residue: you will find poignant and absurd scenes in our constitutional history. Don't let them mislead you: if you write a constitution, for this country or any other, take my advice and put an executive branch into it. It is necessary. And as long as it is under control, it may work out tolerably well – even if the scope of its power is unspecified and undertheorized.

⁴⁴ See e.g. Dr Andrew Blick and Richard Gordon QC above n 34, 'Using the Prerogative for Major Constitutional Change': 'The Commons could also seek to bring down the government – a nuclear option that is unlikely in practice to happen.' p 18.



There is attraction in the argument that prevailed in the Supreme Court in *Gina Miller's* case, that the royal prerogative could not lawfully be used to commence the United Kingdom's withdrawal from the European Union. The attraction lies in the view that prerogative power –the constitutional power of the executive– is a stubborn stain that has been partly but not entirely washed out of our constitution. This paper argues against the stubborn stain theory. There are positive reasons of constitutional principle for an efficient, unified and democratic executive. In the British tradition from *Magna Carta* to *Miller*, executive power has gradually been transferred from the monarch to Parliament, and from the monarch to the judges. The tradition seems to support the idea that executive power is generally bad. But we can only understand the extent of the executive power –and the ways in which it ought to be limited and constrained– if we understand its constitutional value. In particular, we need to understand its value in making the United Kingdom a community, capable of acting as a legal person in international relations.

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