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'Anarchy in the UK': To what extent does the Miller litigation relating to Article 50 TEU and the UK approach to integration demonstrate the incompatibility of creating an 'ever closer Union' with the Article 4(2) TEU requirement to respect the 'national identity' of Member States?

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'Anarchy in the UK': To what extent does the *Miller* litigation relating to Article 50 TEU and the UK approach to integration demonstrate the incompatibility of creating an 'ever closer Union' with the Article 4(2) TEU requirement to respect the 'national identity' of Member States?

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Introduction

It has been said that the concept of creating an 'ever closer Union'[1] (ECU) symbolises the dynamic and transitional nature of the Union[2] legal order: recourse to such terminology means emphasising a model of European integration '…defined not by its finality but by its movement…'.[3] This process may be interstitial, cautious or unhurried, but it always requires that the Member States are heading towards, rather than away from each other.[4] For those sceptical of such a process, it may seem natural to provide obstacles to integration. Indeed, since the sweeping transfer of competence from Member States to the Union enacted in the Maastricht Treaty and subsequent treaty reform, scholarship has focused on how Member States may retain a sense of individuality, against the rising tide of European integration.[5] Enter, with the Lisbon Treaty, the '…fashionable concept in legal scholarship…'[6] of protecting national identity, enshrined in Article 4(2) of the Treaty on European Union (TEU). This piece shall demonstrate the irreconcilability of these two divergent aims: protection of national (constitutional) identity and the ECU project. This incompatibility will be shown through the lens of the United Kingdom's (UK) membership of the European Union (EU), in order to elucidate the following:

1) The constitutionalising nature of EU law as a source of law superior to any law of a Member State;
2) The relationship between the EU legal order and the legal systems of Member States;
3) The constantly evolving project of 'ever closer Union';
4) The futility of attempting to protect national constitutional identity as an EU Member State, which *suggests* the waning relevance of an un-hierarchical constitutional pluralism in pluralistic legal interactions;

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[1] Preamble n°1 of the Treaty of Rome, 1957.

[2] The author shall refer, at times anachronistically, to "Union law" though some of the commentaries cited here will have referred to "Community law".

[3] J. DE RUYT, 'Is there an escape from "Ever Closer Union"?', Egmont, European Policy Briefs No. 49, 28 February 2018, retrieved 3rd August 2022, <http://www.egmontinstitute.be/is-there-an-escape-from-ever-closer-union/>, pp.1-2.

[4] ibid, p.2.

[5] M-C. PONTHOREAU, « Les Embarras de l'Identité de l'État », in M. FATIN-ROUGE STEFANINI and others, *L'identité à la croisée des états et de l'Europe: Quels sens? Quelles fonctions*?, Bruylant: Bruxelles, 2015, pp.168-169.

[6] F. FABBRINI, A. SAJÓ, 'The dangers of constitutional identity', (2019) 25, European Law Journal, p.473.

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5) The subsequent irrelevance of Article 4(2) TEU as an approach to conserving national *constitutional* identity in the UK;
6) The significance of Article 50 TEU as the only mode of *unilaterally* halting European integration.

These matters shall be discussed throughout the following analysis, proceeding in three parts:

The first section shall explain the purpose of Article 4(2) TEU, focusing on the potential of the clause from a Member State perspective, thus emphasising its constitutional element. The overpowering nature of the Union legal system contrary to national claims shall be introduced. The second section shall then examine the supreme nature of Union law over Member State law, analysing its long-disputed – though ultimately irrefutable – impact in the UK. The author will develop an analytical lens through which to investigate constitutional change, based on a nuanced interpretation of Hart's theory of the legal system,[7] and updated to account for contemporary legal phenomena. In the final section, the reality of constitutional change in the UK will be established, by applying the theory set out in the preceding analysis. This theory is evidenced via the *Miller* case, which concerned the substantive constitutional requirements for the UK to begin the withdrawal process, in accordance with Article 50(1) TEU.[8] This shall demonstrate the irreconcilability of an ever-progressing, supreme Union model, with the defence of fundamental national constitutional structures.

1. The paradox of Article 4(2) TEU

Protecting the sovereign power of the state against supra-national structures may be seen as a necessary corollary of ceding some of it on the international stage. Accordingly, Article 4(2) TEU has been hailed as a way to allow Member States to assert their own fundamental constitutional structures at the EU-level and even (incorrectly) as '…an important qualification of the rule on the primacy of EU law, and a modification of the case law under *Costa v ENEL*.'[9] Yet, the desire to carve out some area of competence that precludes European integration is a doomed project.[10] Wallace notes that European nations are undergoing a '…new interpretation of statehood… [the] nature [of which] …remains both unclear and contested.'[11] Within this framework there has been a recently renewed focus of Member States, redirecting their attention from sovereignty to identity.[12] Indeed, when discussing the national identities of Member States, the cultural elements of a nation have oftentimes taken centre stage; this is despite the fact that, since the Maastricht and Lisbon Treaties, 'national identity', when understood as 'constitutional identity', provides the backdrop to an important legal analysis.[13] Contrarily, Preshova has suggested that there

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[7] H.L.A. HART, *The Concept of Law,* 3rd ed., Oxford University Press: Oxford.

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

[9] L.F.M. BESSELINK, 'National and constitutional identity before and after Lisbon', (2010) 6(3), *Utrecht Law Review,* p.48.

[10] *See further*: Section 2.1.

[11] W. WALLACE, 'The Sharing of Sovereignty: The European Paradox', (1999) XLVII, *Political Studies*, p.505.

[12] A.S. ARNAIZ, C.A. LLIVINA (eds.), *National Constitutional Identity and European Integration*, 1st ed., Intersentia: Cambridge, 2013, pp.3-4.

[13] BESSELINK, *supra* note 9, pp.36-37.

exists a '…tacit consensus among scholars that constitutional values come within the meaning of the national identity clause. The same understanding is present in the decisions of both national constitutional courts and the ECJ…'.[14] Thus, two pitfalls in the literature relating to Article 4(2) TEU have been identified – the failure to see the relevance of national constitutional identity (NCI) at all, and the assumption that NCI is inherent in the provision. This section shall reveal the inherent link between preserving the *constitutional* identity of Member States and the Article 4(2) TEU stipulation of protecting *national* identity. There is thus a *paradox* at the heart of Article 4(2) TEU: protecting NCI as both a *vital* aim against the rising tide of European integration, and a *futile* endeavour.

1.1 The conventional use of Article 4(2) TEU

The genesis of Article 4(2) TEU may reveal much of its purpose. The provision promises that the European Union will 'respect' matters pertinent to national identity, its predecessor being the now-defunct Article F(1) of the Maastricht Treaty, which was essentially linked to democratic governance.[15] The development of this provision from the Treaty of Amsterdam to that of Lisbon might show that, in the words of Advocate-General Maduro, the Union has been '…obliged to respect the constitutional identity of the Member States…[since] the outset.'[16] Though, the most recent iteration in the Lisbon Treaty started out on the wrong foot, as it followed the failed Treaty Establishing a Constitution for Europe (TECE). This was supposed '…to carve out core areas of national sovereignty and essential state functions and list exclusive competences of the Member States…'.[17] Given that an expansive interpretation of the provision could destabilise the primacy of Union law, maintaining the limited functionality of the clause is perhaps a justification '…for the Court to keep Article 4(2) TEU a dead letter.'[18] At the Union level, then, the national identity clause sits in a precarious position, having undergone an evolution in the Treaties. The question is to what extent the protection of NCI has persistently and consistently been a goal,[19] in order to characterise its existence as an obstacle to further European integration.

It is uncontroversial to suggest that the national identity clause has been most effective in the realm of establishing the internal market. Safeguarding national identity has found itself nestled amongst the various interests which may justify 'public interest' derogations from citizenship and internal market Treaty provisions.[20] For instance, Germany has invoked a particularly German conception of 'human dignity' in *Omega* to deny the importation of '…games involving the simulation of acts of violence against persons, in particular the

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[14] D. PRESHOVA, 'Battleground or Meeting Point? Respect for National Identities in the European Union – Article 4(2) of the Treaty on the European Union', (2012) 8 *Croatian Yearbook of European Law & Policy*, p.274.

[15] M. CLAES, J. REESTMAN, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case', (2015) 16(4), *German Law Journal*, pp.932.

[16] Opinion of Advocate General Maduro in case C-213/07, *Michaniki*, delivered on 8 October 2008, EU:C:2008:544, paragraph 31.

[17] CLAES, REESTMAN, *supra* note 15, p.933.

[18] L.D. SPIEKER, 'Framing and managing constitutional identity conflicts: How to stabilize the *modus vivendi* between the Court of Justice and national constitutional courts', (2020) 57, Common Market Law Review, p.384.

[19] *Michaniki*, *supra* note 16.

[20] S. GARBEN, 'Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers', (2020) 58(1), *Journal of Common Market Studies*, p.50; B. GUASTAFERRO, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', (2012) 31(1), Yearbook of European Law, pp.290-295.

representation of acts of homicide…'.[21] The European Court of Justice (ECJ) has allowed Austria to reject the use of noble titles recognised in other states in *Sayn-Wittgenstein.*[22] Garben uses such illustrations as evidence that 'Article 4(2) TEU is thus seamlessly integrated into the existing case law on derogations from the direct application of Treaty provisions.'[23] The use of the clause in this way has profound implications for its utility as a limit to European integration. Primarily, the NCI clause is fundamentally not a 'trump card' for Member States and national courts, but simply a *possibility* for dialogue between the Union and those courts.[24] Though, this presupposes a more comprehensive discourse occurring in the 'negotiations' between these two.[25] This idealised vision of the clause drawing red lines beyond which European integration cannot cross is optimistic; but, it fails to represent reality.

An attempt to accommodate Member State interests in the process of implementing EU law is uncontroversial, and exists prominently in public interest derogations such as those in Article 36 TFEU pertaining to free movement of goods. Article 4(2) therefore *can* have a role to play in that regard and, indeed, has. Nevertheless, to construct a dialogue which allows national *constitutional* concerns to push back European integration, based on fundamental NCI, misrepresents how national courts and the Court of Justice of the European Union (CJEU) see their role. Pertinently, a constitutional court of a Member State might perceive itself as the 'guardian' of NCI, asserting untouchable areas of national identity which the *'competence creep'* of the CJEU must not disturb.[26] Yet, using a Treaty article to achieve this translates the national court's concern into a '*Europeanized*'[27] standard, giving the final word on the Member State's NCI to the CJEU and the Union itself.[28] Thus, in this deliberative inquiry, EU law is both *alpha* and *omega* – simply put, the buck stops with EU law. It corresponds to saying that concerns of NCI can be *accommodated* in EU law, *so long as* they are palatable to the Union legal order under specific conditions. The norm of national law that might be used as a defence to integration is not external to the Union legal order but incorporated therein. Accordingly, it is much more apposite to speak of such a conflict as '…an "EU (secondary legal) norm versus an EU (primary legal) norm" conflict…'.[29] Dressing national norms up in EU law clothing in order to facilitate a dispute undermines the possibility to use Article 4(2) TEU to protect national constitutional identity in a *substantive* sense from the outset.

1.2 A *romantic* reading of Article 4(2) TEU

Having established how the identity clause operates, it is necessary to establish what Article 4(2) TEU aims to be, and why the derogations sought under it are inherently constitutional. By offering a legal basis through which the Union (specifically the Court of

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[21] Judgment of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02, EU:C:2004:614, paragraph 39.

[22] Judgment of 22 December 2010, *Sayn-Wittgenstein v Landeshauptmann von Wien,* C-208/09, EU:C:2010:806.

[23] GARBEN, *supra* note 20, p.50.

[24] M. CLAES, 'National Identity: Trump card or up for negotiation?', *in* A.S. ARNAIZ, C.A. LLIVINA (eds.), *National Constitutional Identity and European Integration*, 1st ed., Intersentia: Cambridge, 2013, pp.109-140, *at* pp.139-40.

[25] ibid, p.123, pp.135-40.

[26] CLAES, *supra* note 24, p.123.

[27] GARBEN, *supra* note 20, p.51.

[28] CLAES, *supra* note 24, pp.123-124.

[29] GARBEN, *supra* note 20, p.51.

Justice) can consider the concerns of national constitutional courts, this *could* generate '…constitutional limits to the primacy of EU law'.[30] Von Bogdandy and Schill typify the relationship between Member States and the Union as encompassing 'composite constitutionalism'[31] through a *'Verbund'*, ('composite'), *i.e.* a pluralistic interaction between both types of legality which generates an interconnectedness of the systems.[32] This is in essence a *'best of both worlds'* approach, where the Union and Member States follow shared goals while upholding their own autonomy.[33] The wording of Article 4(2) TEU suggests this, in that the identity clause should allow Member States to define[34] and uphold their 'fundamental [constitutional] structures', while forming part of the bigger whole. This engenders an EU legal order where national constitutional courts police the limits of their competence transfer through a constitutional compatibility analysis, thereby downgrading EU *'autonomy'* [and primacy] from an absolute to a relative concept.[35] The attempts pre-dating Article 4(2) TEU to include NCI protection in the Treaties betray the clause's purpose as a *'constitutional'* claim. Despite the provision's predecessors in the Treaties of Maastricht and Amsterdam, it was the *travaux préparatoires* of the Working Group attempting to create the so-called 'Christophersen clause' (to be inserted into the TECE) that aimed to establish *'no go areas'* for EU harmonisation.[36] The aim to recalibrate competence in favour of Member State constitutions envisioned eradicating any impression that the Union allocates competences to Member States, emphasising *respect* from the Union.[37] Though the TECE failed, this clause was replicated in the Lisbon Treaty, taking the form of Article 4(2) TEU, which also sought protection of those most 'fundamental' features of Member State constitutions – this avoided the creation of a catch-all permitting arbitrary Member State derogation from further harmonisation measures.[38] Preliminarily, if the foundational elements of a Member State's constitution can be eroded by further integration, or as a result simply of membership of the Union, the efficacy of Article 4(2) TEU is already undermined.

Section 1.1 has recognised the inherent limitations of placing certain aspects of a Member State's national or constitutional identity beyond the *'competence creep'* in European integration. This does not, however, negate the essence of what Article 4(2) TEU sets out to achieve. The present author advocates for a *romantic* reading of the provision, meaning that Article 4(2) TEU was intended to be viewed from a state-centric perspective. The Union is developing an increasingly 'federal' edifice, therefore Member States are consequently

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[30] A. VON BOGDANDY, S. SCHILL, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty', (2011) 48, Common Market Law Review, p.1419.

[31] ibid, pp.1417-1454, particularly p.1420.

[32] ibid.

[33] SCHMIDT-AßMANN, 'Einleitung: Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts', *in* Schmidt-Aßmann and Schöndorf-Haubold (eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005), pp.1-6 et seq.; Voßkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 EuConst (2010), 175, 183-4.

[34] VON BOGDANDY, SCHILL, *supra* note 30, p.1429.

[35] CLAES, REESTMAN, *supra* note 15, p.968.

[36] GUASTAFERRO, *supra* note 20, p.274.

[37] Secretariat of the European Convention, *Working Group V on Complementary Competencies*, CONV 375/1/02 REV 1, Brussels, 4 November 2002, retrieved 1st May 2022, <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00375-re01.en02.pdf>, pp.10-11.

[38] VON BOGDANDY, SCHILL, *supra* note 30, pp.1430-1431; *also* PRESHOVA, *supra* note 14, pp.271-3.

inclined to protect their idiosyncratic constitutional features, varying between states.[39] Thus, the states themselves should define constitutional red lines. This theme is reflected in the current jurisprudence;[40] therefore this analysis looks to the 'reservations and footnotes'[41] that national courts have attempted to attach to the unqualified notion of primacy, in order to demonstrate the proper state-centric understanding of Article 4(2) TEU as protection of NCI. It is in national constitutional courts where it has been possible to tie national provisions protecting the 'core' of said constitution, and Article 4(2) TEU.[42] The German *Bundesverfassungsgericht* has played a prominent role in ascertaining this link. It is in the national courts' practices laying claim to the 'final say' over matters which strike to the heart of their most important constitutional provisions, where we see the clear link forged between the preceding 'Chrisopherson clause' on competence allocation, and the ensuing Article 4(2) TEU as the gateway through which to qualify EU primacy, asserting their own 'sovereign authority'.[43] This holds particularly true for the German constitutional court. However, interestingly, the *Bundesverfassungsgericht* has sought to distinguish the Union notion of NCI review and the concept of NCI in Germany.[44]

The *Gauweiler*[45] case demonstrates the essential link between sovereignty, final say and core constitutional identity, while highlighting the different conceptions that the Union and Member States hold in characterising this relationship.[46] The reference to the ECJ in *Gauweiler* asked whether the European Central Bank (ECB) overstepped its powers through the Outright Monetary Transactions scheme. The underlying constitutional theme is the so-called *Kompetenz-Kompetenz*, *i.e.*, which court dictates the contours of the Union's competence.[47] In the accompanying opinion, Advocate-General Cruz Villalón highlights unity in the '…basic convergence between the constitutional identity of the Union and that of each of the Member States.'[48] Contrarily, the German notion of constitutional identity rests in the sole capacity of the German people to dictate changes to the central governing principles of their constitution, thus where the CJEU has a tendency to amalgamate NCI with Union constitutional identity, the German court wishes to assert its own understanding.[49] Article 79(3) of the German Basic law, the so-called 'eternity clause', contains aspects of the German constitution which cannot be overridden even through legislative amendment, included therein the sovereignty of the people. The *Bundesverfassungsgericht* asserts that the Union has a duty not to affect these via

[39] ibid (VON BOGDANDY, SCHILL), pp.1245-1246.

[40] Judgment of 16 December 2008, *Michaniki AE v Ethniko Symvoulio Radiotileorasis*, C-213/07, EU:C:2008:731, at para 56; *also* PRESHOVA, *supra* note 14, pp.277

[41] M. CLAES, *The National Courts' Mandate in the European Constitution*, 1st ed., Hart Publishing: London, 2006, p.666.

[42] PRESHOVA, *supra* note 14, p.278.

[43] GUASTAFERRO, *supra* note 20, pp.266-271.

[44] CLAES, REESTMAN, *supra* note 15, p.918.

[45] Judgment of 16 June 2015, *Gauweiler v Deutscher Bundestag*, C-62/14, EU:C:2015:400.

[46] CLAES, REESTMAN, *supra* note 15, pp.919-922.

[47] R.D. KELEMEN, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone', (2016) 23(1), Maastricht Journal of European and Comparative Law, p.138.

[48] Opinion of Advocate General Cruz Villalón in case C-62/14, *Gauweiler*, delivered on 14 January 2015, EU:C:2015:7, paragraph 61.

[49] CLAES, REESTMAN, *supra* note 15, pp.920-921.

harmonisation measures.[50] In making its *Gauweiler* reference the German court demarcated constitutional identity review under German law as conceptually different to that offered by EU law under Article 4(2) TEU, in its *intensity* (insofar as it should not be a relative concept which can be balanced out by other ideas[51]) and its *jurisdiction* (as a matter to be decided solely by the German court, not the ECJ[52]). The German ideal denotes the correct interpretation of a state's national constitutional identity, in that this is how other national constitutional courts will naturally perceive Article 4(2) TEU. This is corroborated by Claes' analysis of the *Bundesverfassungsgericht's* rejection of the noble title ban in *Sayn-Wittgenstein* not resembling German NCI, in that such a ban might simply not have been sufficiently 'fundamental' enough to come under NCI.[53] Though, the problem for the German courts seems not to be the disparity between Article 4(2) TEU and their own 'eternity clause', but that national courts must substantively define their own identity, rather than the CJEU assessing the compatibility of said identity with other Union values.[54]

The preceding analysis allows us to deduce the best possible interpretation of Article 4(2) TEU from the national constitutional courts' perspective: one that is defined, policed and applied authoritatively by them, to protect facets of their constitutions which are '…inherent in their ***fundamental structures***, political and ***constitutional***…',[55] rather than trite and trivial issues. Where it will be shown that the fundamental constitutional structure of the UK constitution has been altered by Union membership, the futility of this *best possible* reading (from a national constitutional law perspective) shall be demonstrated.

1.3 'Ever closer Union' and the EU legal order

The difficulty of having a state-centric provision in the TEU which aims to protect the essence of a Member State's constitutional prerogatives is the fact that the very essence of the Union legal order itself seems predicated on further integration at all costs. Hence, Member State constitutional courts are fighting a losing battle. The constitutional transformation that is undertaken by Member States who accede to the Union is part of an ongoing concept which does not yield, and which is, according to the present author, a *sine qua non* of Union membership: the establishment of an 'ever closer Union among the peoples of Europe'.[56] This is an inherent feature, inspired by Europe's troublesome history of disunity.[57] The forward-marching nature of integration falls squarely within the notion of ECU. This is because the competence attribution which occurs from the Member States is a dynamic, ongoing process. In practice, the outermost boundaries of European integration

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[50] BVerfG, 2BvE 2/08, German *Bundesverfassungsgericht*, 30 June 2009, Translation: <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>, para. 228; the "*Lisbon* judgment", paras 217-218.

[51] BVerfG, 2BvR 2728/13, German *Bundesverfassungsgericht*, 14 January 2014, Translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html, para 29.

[52] ibid.

[53] CLAES, REESTMAN, *supra* note 15, pp.939-940.

[54] ibid, pp.940-941.

[55] Article 4(2) TEU.

[56] *Supra* note 1.

[57] D. SARMIENTO, 'The EU's Constitutional Core', *in* A.S. ARNAIZ, C.A. LLIVINA, (eds.), *National Constitutional Identity and European Integration*, 1st ed., Intersentia: Cambridge, 2013, pp.179-180.

are not common knowledge, because the end-goal is nowhere prescribed.[58] But that does not negate the existence of an end-goal – it means only that reservations and 'opt-outs' such as the 'subsidiarity' principle may be operationalised in order to maintain differentiation between the Member States as they integrate.[59] This 'slowing' aspiration has been present since the Lisbon Treaty,[60] though halting integration is a different matter. Jovanović uses Schopenhauer's allegory of the limits of social collaboration to demonstrate the 'Porcupine Dilemma of…European Integration'.[61] The comparison is simple:[62] porcupines in freezing temperatures must maintain proximity to share body heat, while maintaining sufficient distance between them so as not to inflict injury to one another with their sharp spines. Member States recognise the benefits of integration but want to do so at their own pace, and this is perhaps why they try to protect the fundamentals of their constitution from further European integration via harmonisation.[63] In light of this, Article 4(2) TEU seems to be a natural continuation of a trend of cautious integration for recalcitrant Member States. However, this inherently state-centred approach conflicts with the constitutional nature of the Union itself as a unique legal entity.

In its own characterisation and operation, the European Union constitutes a legal system. A legal system classically makes claims of *supremacy, openness* and *comprehensiveness*.[64] Of these, supremacy is perhaps the least troubling given the claims that the Union makes vis-à-vis Member States.[65] The *comprehensiveness* of the system might warrant further inspection in that the Union does not act in a comprehensive manner – there exist opt-outs, aforementioned derogations in the internal market, and general ways of lessening the pace of integration.[66] However, the aim of an 'ever closer Union' is ongoing and inevitable: 'One has to be in or out.'[67] That the 'ever closer' model symbolises an unhalting forward march can be seen by the way in which judges understand the substantive division of competences between the EU and its Member States. Originally, the Court referred to the Member States' sovereign rights being limited 'within limited fields'.[68] This limitation would later come to be referred to as taking place 'in ever wider fields'.[69] Thus, not only is the (future) outer boundary of competences which the Union claims for itself conceptually and substantively undefined in scope – it is also ever-expanding. Hence, it is doubtful how David Cameron's achievement of an 'opt-out' from ECU, though the nearest anyone has come to reconciling a reluctant state with an ever-advancing movement,[70] would have

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[58] R. TONIATTI, 'Sovereignty Lost, Constitutional Identity Regained', *in* A.S. ARNAIZ, C.A. LLIVINA, (eds.), *National Constitutional Identity and European Integration*, 1st ed., Intersentia: Cambridge, 2013, pp.49-53.

[59] ibid, pp.56-57.

[60] ibid.

[61] M. JOVANOVIĆ, 'Sovereignty – Out, Constitutional Identity – In: The 'Core Areas' Controversy in the European Union' 28 April 2015, retrieved 3rd August 2022, Available at SSRN: https://ssrn.com/abstract=2599925, p.24-25, *citing* A. SCHOPENHAUER, *Parerga und Paralipomena, Vol. 2,* Oxford University Press: Oxford, 1974, Section 396, pp.651-652.

[62] ibid (JOVANOVIĆ), pp.24-25.

[63] ibid 25.

[64] J. RAZ, *The Authority of Law*, 2nd ed., Oxford University Press: Oxford, 2009, pp.116-120.

[65] Section 2.1.

[66] TONIATTI, *supra* note 58, pp.49-50.

[67] DE RUYT, *supra* note 3, p.2.

[68] Judgment of 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, C-26/62, EU:C:1963:1.

[69] Opinion of the Court of 14 December 1991, *Opinion 1/91*, ECLI:EU:C:1991:490, para 21.

[70] M. WESTLAKE, *Slipping Loose: The UK's Long Drift Away from the European Union*, Agenda Publishing: Newcastle, 2020, *'preface'*.

worked in practice. Perhaps the concept was doomed from the start, though now it will only have symbolic import. The notion of *openness* is characterised by a capacity to incorporate other norms and systems within the overall legal framework.[71] To suppose that Union law simply grafts onto municipal legal systems is ruled out, considering the aforementioned supremacy claims made by the Union. A more nuanced picture may thus emerge, either characterising the relationship between the Union and Member States as a group of states cooperating with one larger legal system (the Union), or an amalgamation of all Member States forming a singular entity with each state comprising a composite, smaller, unit.[72] This latter model, the 'One Big Legal System'[73] is rejected by Dickson because such an analysis would fail to recognise the unique prism through which each Member State perceives their own law.[74]

However, the claims which Member States make fall often on deaf ears. For instance, Kelemen's outright rejection of constitutional pluralism traces the ECJ and *Bundesverfassungsgericht's* continued 'parallel play' where both have maintained that legal supremacy belongs to them, hence playing in proximity though never together – this picture topples when the ECJ in *Gauweiler* vehemently denies the German court's claim.[75] Accordingly, this piece asserts that the Union claims supremacy against Member States, while accommodating their legal systems as 'sub-systems'.[76] This would be controversial, if not for the fact that joining the Union is a voluntary enterprise which Member States can leave when desirous.[77] This special system is autonomous, therefore the judicial dialogue which takes place between national courts and the CJEU (such as under Article 267 TFEU) is designed to safeguard '…consistency and uniformity in the interpretation of EU law…'.[78] Accordingly, a top-down approach is essential to comprehending the Union system as an entity which incorporates other systems rather than a constituent part thereof. Hitherto, legal pluralism has emphasised the extent of collaborative interface between legal systems, negating the notion of interactions based on hierarchy.[79] However, to support legal pluralism while providing for one system having the ultimate claim to authority is not such an oxymoronic notion. Rather, the Union system provides the particularly special circumstances for such a relationship to take hold, providing for a plurality of systems, though within one correct interpretation of Union law – this hierarchical view of primacy is essential to understanding the Union order. The autonomous EU legal system means that uses of Article 4(2) TEU as a 'defensive tool'[80] must remain futile. If claims such as in *Gauweiler* were anything but statements of political rhetoric, the *uniformity* of the Union

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[71] K. CULVER, M. GIUDICE, 'Not a System but an Order', *in* J. DICKSON, P. ELEFTHERIADIS, *Philosophical Foundations of European Union Law*, 1st ed., Oxford University Press: Oxford, 2012, p.59.

[72] J. DICKSON, 'Towards a Theory of European Union Legal Systems', *in*, J. DICKSON, P. ELEFTHERIADIS, *Philosophical Foundations of European Union Law*, 1st ed., Oxford University Press: Oxford, 2012, pp.47-50.

[73] ibid, p.47.

[74] ibid, p.48-49.

[75] KELEMEN, *supra* note 47, pp.136-150.

[76] N. MACCORMICK, *Questioning Sovereignty*, 1st ed., Oxford University Press: Oxford, 1999, p.116.

[77] The *Lisbon* judgment, *supra* note 50, paragraph 329.

[78] Judgment of 6 March 2018, *Slowakische Republik v Achmea BV*, C-284/16, EU:C:2018:158, paragraph 35.

[79] MACCORMICK, *supra* note 76, p.118.

[80] FABBRINI, SAJÓ, *supra* note 6, pp.469-473.

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legal system would be compromised, with Member States derogating from any provision based on perceptions of their own constitutional principles.[81]

Further integration must continue, even to the detriment of any constitutional provision of a Member State. Therefore, while national courts may see Article 4(2) TEU as vital, it is ultimately *futile*. This claim will be corroborated through the impact of the Union legal system on UK constitutional identity, one of its more rebellious, (ex)sub-parts.

2. The impact of EU integration on constitutional identity in the UK

The dilemma presented in Section 1 is an order predicated on further integration which tries to incorporate rival constitutional identities, a seeming contradiction in terms. Despite Union law aiming to coalesce and *integrate* rival legal systems, the inevitable result is in fact *conflict*.[82] In common parlance, conflict seems to presuppose a winner and a loser. However, EU law is quite unique, because the legal systems of Member States and that of the Union seem to be *'tied'*. The systems operate on a 'constitutional imperative'[83] of divergence – national courts and the CJEU both claim in tandem to understand their own systems as providing the *source* which mandates Union law, in biblical terms 'the first commandment'.[84] For Culver and Giudice, previous *monist*, *dualist* and even *pluralist* attempts to interpret this phenomenon have provided unsatisfactory answers, characterising this communication between national systems and the EU as an institutional breakdown.[85] Yet, if it is possible to truly understand the authority from which Union law is derived, that would provide a clearer picture of whose claim wins. Bentham warned of legal fictions in so far as '…the pestilential breath of Fiction poisons the sense of every instrument it comes near'.[86] This account states that if 'rival supremacy claims'[87] are analysed, a plain reading of EU law provides the irresistible conclusion that supremacy and authority lies with the Union. To state otherwise is fictional. Advancing beyond mere hypothesis, this section shall demonstrate how conflict has occurred in the UK, showing why Union law is correct to claim constitutional authority. The particular nature of supreme Union law shall demonstrate how constitutional transformation was effected because of the United Kingdom's membership.

2.1 Supremacy – more *straightforward*[88] than you think

EU law scholars tend to inculcate their students with the idea of Union law as some *sui generis*[89] entity. Yet, instead of kicking the can down the road by saying EU law is simply unique, we must understand *how* and *why* Union integration is so encompassing for Member States. Instead of perfunctorily reiterating the same tired clichés, this article

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[81] KELEMEN, *supra* note 47, pp.148-149.

[82] H.P. GLENN, 'Doin' the Transsystemic: Legal Systems and Legal Traditions' (2005) 50 McGill Law Journal p.896.

[83] T. TRIDIMAS, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability', *in* D. CHALMERS, A. ARNULL (eds.), *The Oxford Handbook of European Union Law*, 1st ed., Oxford University Press: Oxford, 2015, p.418.

[84] ibid.

[85] CULVER, GIUDICE, *supra* note 71, pp.62-68.

[86] J. BENTHAM, *A Fragment on Government* (JH Burns and HLA Hart (eds)), Cambridge: Cambridge University Press: Cambridge, 1988, p.21.

[87] CULVER and GIUDICE, *supra* note 71, p.62.

[88] KELEMEN, *supra* note 47, p.150.

[89] CULVER, GIUDICE, *supra* note 71, p.75.

proposes to go *'back to basics'*. Article 4(2) TEU aims to '…undermine the creeping encroachment of EU powers upon sensitive areas related to national identity and sovereignty.'[90] This is a state-centred perspective. However, understanding the EU as a source of law naturally requires an EU-centred perspective. From this standpoint, there can be no mechanism, Treaty-based or otherwise, which provides a block to EU integration. If the Union requires a competence, the Union can take it, so that '…resistance is futile…'.[91] The reason that Union law is special has nothing to do with its content *per se*, that which it achieves, but rather what it *is*, and how we rank it.[92] By its capacity to sit atop or abrogate any contrary legal norm, Union law is '…the hallmark of exaltation.'[93] It is a project built by Member States, which has to an extent now surpassed them. The Union was borne of certain constitutional principles rendering it *novel* and *supreme*. These principles were established early on, as *direct effect* and *primacy*, forming '…the essential foundations of the European legal system…'.[94] This process was initiated in the '*pacific judicial revolution*'[95] which took place in the seminal case of *Van Gend en Loos*.[96]

The novelty of the Union system starts with *Van Gend en Loos*, which established the *direct effect* of EU law. The judicial reasoning was *prima facie* intuitive: Union law *must* apply in domestic proceedings, regardless of compatibility with national constitutional provisions, because this represents the choice of Member States who ratified the Treaty; 'the Community constitutes a ***new legal order*** of international law for the benefit of which the states have ***limited their sovereign rights***.'[97] The obligations and rights created are now, from the Member State viewpoint, '…part of their legal heritage.'[98] This is radical because in classifying Union law rights as a component of the Member States' heritage, the dynamic transcends the simple notion of an approval from a domestic legal system, enforcing an extraneous norm.[99] The use of this word 'heritage' is prescient – the interaction between the Union and its Member States appears more intense, and lasting. Moreover, the significance of the case lies not in the *possibility* of direct effect in a similar case; such was evident in the wording of the Treaty itself, but rather the case breaks new ground by stating that it is for the Court of Justice, not domestic legal orders, to indicate when provisions of the Treaty are directly effective.[100] This has the effect of 'dethroning' Member State governments, previously perceived as controlling the system for implementing further integration.[101] Much more controversially, it is not simply the national governments which

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[90] GUASTAFERRO, *supra* note 20, p.286.

[91] GARBEN, *supra* note 20, p.51.

[92] D. CHALMERS, L. BARROSO, '*What* Van Gen den Loos *stands for*', (2014) 12(1), International Journal of Constitutional Law, p.112.

[93] ibid.

[94] W. PHELAN, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt', (2017) 28(3), European Journal of International Law, p.938.

[95] R. LECOURT, *L'Europe des Juges*, Bruylant: Bruxelles, 1976, p.7 [translated by the present author].

[96] *Van Gend en Loos*, *supra* note 68.

[97] ibid [emphasis added].

[98] ibid.

[99] J. DICKSON, 'How many legal systems? Some puzzles regarding the identity conditions of, and relations between, legal systems in the European Union', (2007) 2, *Problema: Anuario de Filosofía y Teoría del Derecho*, pp.32-33.

[100] P. CRAIG, G. DE BÚRCA, *The Evolution of EU Law*, 2nd ed., Oxford University Press: Oxford, 2011, p.327.

[101] C. TOMUSCHAT, 'Deuxième Séance de Travail – Les Retombées: Introduction', *in* CJEU, '50th anniversary of the judgment in *Van Gend en Loos*', retrieved 15th September 2022, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf>, p.50.

are 'dethroned' – rather, it is their national constitutional systems as a whole. Owing to the strong language that the CJEU employs in setting down this course, the legal order is clearly innovative from the start; it is with *Costa v ENEL*[102] that the basis of the constitutional development set out heretofore[103] comes into bloom.

Costa v ENEL laid down another simple but momentous principle. Primacy[104] is a characteristic which prevents conflicting domestic law from overriding Union law – national systems are obliged to apply Union law over and above inconsistent national law because of the '…special and original nature…'[105] of the former. The CJEU is even clearer this time in showing the Member States that they must acknowledge that in ratifying the Treaties, they have accepted '…a ***permanent*** limitation of their sovereign rights.'[106] Notably, Advocate General Lagrange in *Costa* recognised the controversial aspect of theorising the essence of the Union legal order, preferring instead to plainly remark that the Treaty produced '…its own legal system which…partly replaces the internal legal system.'[107] Yet, it is precisely the essence of that order which creates such an effect. Indeed, understanding the nature of EU law facilitates a clear understanding of the effect the latter has on national constitutions. Claiming supremacy is a necessary precondition of a legal system.[108] In so doing, the Court of Justice reaffirms the special relationship that was mentioned in *Van Gend en Loos*, though now Union norms do not only transform into the heritage of a

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[102] Judgment of 15 July 1964, *Costa v ENEL*, C-6/64, EU:C:1964:66.

[103] CHALMERS, BARROSO, *supra* note 92, p.112.

[104] '*Primacy'* and '*supremacy'* are interchangeable, and both shall be used throughout. The CJEU uses 'primacy'. This section uses the word '*supremacy'* to emphasise the strong legal claim that EU law makes vis-à-vis Member States. The distinction between the two has, according to Justin Lindeboom, been used recently as a battleground for Member States to attempt to reassert their own sovereignty *vis-à-vis* the Union – though this conflict only seeks to reinforce the idea that both sides seek to define their own supremacy by reference to their own constitutional edifice, something which draws Lindeboom to the conclusion that a new approach is needed which defines EU legal supremacy in ethical terms (*See further*: J. LINDEBOOM, 'Op-Ed: "Legal Embarrassment after PSPP and K 3/21: The Bogus Distinction between Primacy- and Supremacy and the Need for an Ethics of EU Law Supremacy"', retrieved 20th September 2022, <https://eulawlive.com/op-ed-legal-embarrassment-after-pspp-and-k-3-21-the-bogus-distinction-between-primacy%c2%ad-and-supremacy-and-the-need-for-an-ethics-of-eu-law-supremacy-by-justin-lindeboom/>.) The relevant cases here are the PSPP ruling of the Karlsruhe Federal Constitutional Court of 5 May 2020 and the Polish Constitutional Tribunal's ruling (K 3/21) of 7 October 2021. Both have been incorrectly equated with each other, where the former pertained to *ultra vires* review of EU acts and the latter to the Polish Constitutional Tribunal's attempt to deny key features of the EU legal system, namely rejecting the compatibility of primacy with its own constitutional disorder in a false dispute (*See further*: A. THIELE, 'Whoever equates Karlsruhe to Warsaw is wildly mistaken', retrieved 20th September 2022, <https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsaw-is-wildly-mistaken/> and S. BIERNAT and E. ŁĘTOWSKA, 'This Was Not Just Another Ultra Vires Judgment!', retrieved 20th September 2022, <https://verfassungsblog.de/this-was-not-just-another-ultra-vires-judgment/>.). The judgments cited herein provide a potential turning point in the debate between EU and Member State supremacy and would merit a separate discussion regarding the significance of these developments and their potential consequences, in greater depth. This article will not address these issues beyond this footnote, for two reasons. Firstly, the judgments, while relevant to the topic, are not necessarily directly related to Article 4(2) TEU, and thus are somewhat beyond the scope of the subject-matter in question. Secondly, this story is still playing out and the end-point remains to be seen. Consequently, more time should pass before the results of this study might be extrapolated to current events. Contrarily, this article has the aim to demonstrate a very particular – some would say, historic – point about EU membership, insofar as it applied to the UK system. It is hoped that the picture painted here will form some foundation for a greater understanding of the novel issues with which the Union grapples, in the aftermath of these cases.

[105] *Costa, supra* note 102.

[106] ibid [emphasis added].

[107] Opinion of Advocate General Lagrange, in case C-6/64, *Costa v ENEL*, delivered on 25 June 1964, EU:C:1964:51.

[108] RAZ, *supra* note 64, pp.116-120.

Member State, but they are 'integral'[109] to those systems.[110] The Court is therefore emphatic in asserting that their previous dicta were not simply a slip of the pen.

Moreover, the doctrine of primacy has a profoundly constitutional effect, as it operates above national constitutional law. Hence, though Germany sought assurance of fundamental rights protection to consent to Union primacy,[111] the ECJ has denied the possibility of challenges to the validity of the acts of Union institutions, stating that fundamental rights protection '…must be ensured within the framework of the structure and objectives of the Community.'[112] Therefore, the Union protects the autonomy of its own system to safeguard rights. When combined with the fact that, per *Simmenthal*, the Treaties '…also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions…',[113] the *constitutionalising* claim of Union law is buttressed. Because of the scope and extent of primacy, it seems incorrect to suppose, as Spieker does, that '…identity concerns constitute a permanent Damocles sword over the primacy of EU law.'[114] In light of the overpowering supremacy of EU law which can seemingly transgress any national provision, the author questions the aim of using an identity clause as an attempt to qualify that primacy.

2.2 Particularities of the legal system

Despite its critics,[115] H.L.A. Hart's legal-positivist account is the most accurate descriptive account of the functioning of a legal system. It will be used to substantiate claims about the particular effect of EU law on national constitutions, thus demonstrating the incompatibility of European integration with the aims of Article 4(2) TEU. Using Hart's explanation of the 'legal system' serves a dual purpose in elucidating the theory set out herein.

Firstly, the 'legal system' is a useful tool to aiding our understanding of the relationships the EU legal order fosters with Member States. This is not to say that there is no merit in a more complex analysis of the interactions that take place beyond this municipal-lens. There are convincing analyses of the nature of EU law that eschew mention of a 'legal system', preferring to focus on the collaboration of Union and Member State institutions to explain how this interaction forms an overall 'order'.[116] This piece will reference such analyses, knowing that Hart himself acknowledged that despite the predominant position that his

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[109] *Costa, supra* note 102.

[110] DICKSON, *supra* note 99, pp.33-34.

[111] J.H.H. WEILER, 'The transformation of Europe', (1991) 100, *Yale Law Journal*, p.2418.

[112] Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte,* C-11/70, EU:C:1970:114, para.4.

[113] Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, C-106/77, EU:C:1978:49, paragraph 17.

[114] SPIEKER, *supra* note 18, p.363.

[115] Hart's most prominent critic was Ronald Dworkin. In responding, Hart successfully rebutted Dworkin's charges, having created a methodologically sound, empirically demonstrable account of legal systems and the nature of legality. See *inter alia*: S.J. SHAPIRO, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed', (2007) Working Paper 77, *University of Michigan Law School*, Available at SSRN: http://dx.doi.org/10.2139/ssrn.968657 (particularly, pages 53-4); B. LEITER, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence', (2003) 48(1), *The American Journal of Jurisprudence*, pp.17–51, at p.18. The present author follows the academic consensus, applying Hart's theory as the accurate account. The potency of his theory lies in its capacity to be nuanced to explain new legal phenomena – the present author's particular interpretation of Hart's work is offered in order to resolve the present question.

[116] K. CULVER, M. GIUDICE, *Legality's Borders*, 1st ed., Oxford University Press: Oxford, 2010, Introduction at xxviii, p.112, *passim*.

explanatory account deserved, it '…cannot by itself illuminate every problem.'[117] However, the 'legal system' is used to describe arrangements here because it is already 'out there' and not an 'esoteric theoretical tool',[118] but a concept with real explanatory value. This piece will coalesce the most salient points of both schools, taking into account the necessity to include in this analysis a '…responsiveness to phenomena…'.[119] This is key considering that the aim here is to demonstrate the impact of Union law on the UK constitution as a historical fact,[120] rather than a contemporary analysis of current arrangements.

Therefore, the second and most important reason for using Hart's account to explain EU law relates to the constitutional change effected in the UK itself by Union membership. It is necessary to note here that the rule of recognition and Hart's general theory feature heavily in UK case law related to Union membership, in academic commentary and was elicited in *Miller* itself.[121] Furthermore, because this piece examines the most fundamental elements of the UK constitution, it does not propose to throw the baby out with the bathwater. Accounts of how parliamentary sovereignty operates in the UK go hand in hand with an explanation of the rule of recognition, therefore this orthodoxy will be kept.

2.2.1 The rule of recognition

Hart's account of the legal system consists of the combination of primary rules (which entail duties and obligations) and secondary rules (which are those rules tasked with the identification of the primary rules).[122] Wishing to avoid the tyranny of a society comprising only primary rules (obligations), Hart explains the creation of secondary rules, the most important being the rule of '*recognition'*, which fixes the *'uncertainty'* in determining the rules in a primitive society.[123] The symbiosis of these primary and secondary rules form '…not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.'[124] To discover the valid source of a legal rule, an assessment is required of the 'complex social situation' where the rule of recognition operates as an identifier, giving rise to the 'foundations of a legal system'.[125] It is therefore on this criterion which an accurate understanding of the effect of EU law on the UK legal system shall turn.

The *complex* rule of recognition matters because it identifies the validity of legal norms, which becomes more significant as the complexity of interacting and conflicting legal norms increases. This is particularly so in the context of the debate between whose authority provides for the effect of EU law in the UK legal system, an Act of Parliament or the Union itself.[126] The criteria allowing for identification of primary rules could take many forms,[127]

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[117] HART, *supra* note 7, p.99.

[118] DICKSON, *supra* note 72, p.31.

[119] CULVER, GIUDICE, *supra* note 71, p.71.

[120] The UK having now left the Union.

[121] *Miller*, *supra* note 8, paragraphs 60, 173, 177, 223-226.

[122] HART, *supra* note 7, p.94.

[123] ibid, pp.91-99.

[124] ibid, p.98.

[125] ibid, p.100.

[126] See, *infra* Section 3.

[127] HART, *supra* note 7, p.100.

which is uncontroversial when thinking of a constitution like the UK, which owes its uniqueness to the '…heterogeneous nature of the sources…',[128] ranging from political conventions to the common law. Nonetheless, in order to understand how the most important source of law in the UK (*formerly,* Parliament) operates in relation to those other sources, it is essential to recognise a key distinction in Hart's work which is often overlooked. Firstly, there can be (and are, in the UK system) multiple rules of recognition which provide criteria for recognising which are legally valid primary rules, and these rules operate on a hierarchical basis, that is of 'relative subordination'.[129] This is logical given that in a case of conflict, there must be one rule which applies, otherwise uncertainty would re-appear in the legal system. Secondly, the pluralistic hierarchy in which these rules operate can and does change; indeed, much to the *chagrin* of experts in analytic jurisprudence,[130] when discussing the relationship between the supremacy of EU law and of parliamentary statute, commentators and even judges often fail to acknowledge these two nuances, namely the existence of a plurality of secondary rules of recognition, and the capacity of those rules to be re-ordered in response to facts. Even as recently as *Miller*, the majority and minority dissent in the Supreme Court made this mistake, thus compromising the explanatory value of the concept.[131] Finally, and most importantly, there must be a distinction made between the *ultimate* rule of recognition, which is the sum total of all those rules of recognition which identify valid legal sources, and the *supreme* rule of recognition (or '*supreme criterion'*) which takes its place as the highest among those rules.[132] Accordingly, a particular criterion

> '…is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas…the latter are not so recognized if they conflict with…the supreme criterion.'[133]

This means in practical terms that the *supreme* criterion sits atop the pecking order of *ultimate* rules of recognition that form a legal order. To establish which is the validating source of a legal rule, it is necessary to search the 'chain of legal reasoning' until arriving at the rule which contains the conditions which allow for the evaluation of the validity of those other rules, but which contains '…***no rule providing criteria for the assessment of its own legal validity***.'[134] To give a hypothetical example, imagine a statute passed in England in 1965 – the specific rule will be validated based on having undergone the correct procedure, however the validity of that Act is predicated on the *supreme* criterion of Parliament's capacity to make or unmake any law. A similar example is given by Hart to demonstrate that it can be easy to confuse the 'ultimate rule of recognition', with 'the supreme criterion' and 'legally unlimited legislature' where the three seem to unite in certain legal systems.[135] However, the UK's accession to the Union in 1972 resulted in a

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[128] J.S. DUGDALE, *The British Constitution*, 2nd ed., James Brodie Ltd, 1965, p.19.

[129] HART, *supra* note 7, p.105.

[130] G. PHILLIPSON, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union'*, (2017) 36(1), Yearbook of European Law, pp.70-72.

[131] R. CRAIG, 'A Simple Application of the Frustration Principle: Prerogative, Statute and *Miller'*, (2017) Brexit Special Extra Issue, Public Law, pp.45-47; see also, *Miller*, *supra* note 8, paragraphs 60, 173, 177, 223-226.

[132] HART, *supra* note 7, pp.106-107.

[133] ibid, p.106.

[134] ibid, p.107 [Emphasis added].

[135] ibid, pp.106-107.

phenomenal shift within the rule of recognition. It is true that over the last three decades, new legal norms have been incorporated into the UK constitution, providing for a significant 'judicialization' of norms via *ultra vires* review of parliamentary statute based on jurisdiction which Acts of Parliament themselves have granted to the UK judiciary.[136] These Acts have altered the hierarchy in and amongst the ultimate rules, conditionally shifting them according to novel and dynamic processes. Legislating to provide for domestic statutory protection of the rights enshrined in the European Convention on Human Rights (ECHR) via the Human Rights Act (HRA) 1998 has been one such significant alteration, whereby the relationship between the judicial and legislative branches has been altered significantly – for instance in section 4 of that Act, judges are able to declare incompatible statutes that clash with ECHR law.[137] While this introduces a new criterion for validity within a burgeoning group of rules of recognition, it does not alter the final say that Parliament has over those rules. Accordingly, such a difference in degree which occurred with the dawn of the HRA 1998 still leaves the *supreme criterion* intact. The effect of Union law on the UK constitution, however, should not be characterised as such a difference in *degree*. Rather, it is a difference in *kind*. The primacy of EU law had the effect of relegating the rule of Parliamentary sovereignty to a rule which defined its own validity according to the new *supreme* criterion of EU law.[138] In the 'chain of reasoning',[139] Parliament may sit above ECHR-derived and inspired law, however the uppermost rule in the system for as long as the UK was a member of the EU was the primacy of EU law. Other sources were validated according to that source, which itself could not be proved valid by any other rule.[140] The buck stopped with EU law.

2.2.2 Parliamentary sovereignty

Parliamentary sovereignty holds a very particular case in the UK constitution. Walter Bagehot once said of the '…ancient and ever-altering [British] Constitution…'[141] that it '…is like an old man who still wears with attached fondness clothes in the fashion of his youth: what you see of him is the same; what you do not see is wholly altered…'.[142] Yet there is one fashion item that the old man will not let go of, the piece that ties the whole ensemble together, and has held steadfast as the top rule (Hart's *supreme criterion*) of the system for over 400 years.[143] That principle is Parliamentary sovereignty, regarded as the quintessence of the UK constitution. Some have suggested that the constitution can be pithily summarised thusly: '…what the Queen in Parliament enacts is law.'[144] The pertinent part is not the reference to monarchy which is a symbolic reference to the fact that statutes are by convention rubber-stamped by the monarch, but the omnipotence of that law-making

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[136] D. OLIVER, *Constitutional Reform in the United Kingdom*, 1st ed., Oxford University Press: Oxford, 2003, p.18.

[137] V. BOGDANOR, 'Human Rights and the New British Constitution', 2009 Tom Sargant memorial annual lecture, retrieved 18th August 2022, available at <https://justice.org.uk/human-rights-and-the-new-british-constitution/, pp.2-3.

[138] Section 2.1.

[139] HART, *supra* note 7, p.107.

[140] ibid.

[141] P. SMITH (ed.), *Bagehot: The English Constitution*, 1st ed., Cambridge University Press: Cambridge, 2001, p.3.

[142] ibid.

[143] C. MUNRO, *Studies in Constitutional Law*, 2nd ed., Oxford University Press: Oxford, 1999, pp.130-133.

[144] V. BOGDANOR, 'Britain is in the process of developing a constitution', 22 September 2004, retrieved 4th April 2020, <https://www.independent.co.uk/voices/commentators/vernon-bogdanor-britain-is-in-the-process-of-developing-a-constitution-547177.html>.

power. According to the revered constitutional scholar A.V. Dicey, Parliamentary sovereignty means both that:

> 'Parliament has the right to make or unmake any law whatever… [and] No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'[145]

This is the fundamental principle encompassing the *national constitutional identity* of the UK. The forthcoming analysis shall demonstrate the abeyance of those two positive and negative principles since 1972, as a result of the UK's accession to the Union. Parliamentary sovereignty has long since gone out of fashion, for our old UK constitution, the principle that he wore proudly for so many years now confined to the back of the wardrobe, as he sports a different ensemble (between 1972-2020). With EU law draped daringly over his shoulders, it is worth asking how such a principle (as Parliamentary sovereignty) which '…lie[s] deep in the history of the English [*sic!*] people…',[146] can be cast aside in favour of '…the legal supremacy of European law [which] has no such deep roots.'[147] The answer is simple: a 'revolution'.[148]

2.2.3 Discovering legal fact through the 'officials'

Charting developments in the rules of recognition will show how the *supreme* rule has changed, therefore giving effect to a profound change in the UK constitution. The essentially social nature of Hart's concept of a rule of recognition lies in the fact of its discovery through action.[149] To discover the operation of a rule of recognition, it must be viewed through the work of an official whose relationship to that rule reveals reality.[150] Officials are those who demonstrate which laws are valid by operationalising them in their speech and action, which amounts to 'acceptance'.[151] They are distinguishable from ordinary citizens who may simply obey the law. Contrarily, the officials accept and thus reveal which rules of recognition operate and how, because they view legal norms from a particular 'internal point of view'.[152] This encompasses not only an active participation in the legal system, but also a 'reflective critical attitude'[153] when participating. This attitude requires *not only* knowledge that disobedience of a rule will be met with sanction, something which can be appreciated by an outsider observing a legal system externally, but *also* that there is rationale for conformity[154] with such a rule, which can only originate from a viewpoint which is both internal and critical.[155]

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[145] A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, 10th ed., Palgrave Macmillan: London, 1959, (Introduction by E.C.S. WADE), pp.xxxiv-xxxv.

[146] ibid, p.69.

[147] V. BOGDANOR, 'The Evolution of a Constitution: Eight Key Moments in British Constitutional History', (2007) 123(Jul), Law Quarterly Review, p.483.

[148] H.W.R. WADE, 'Sovereignty - revolution or evolution?', (1996) 112(Oct), Law Quarterly Review, pp.568-575.

[149] CULVER, GIUDICE, *supra* note 116, p.19.

[150] HART, *supra* note 7, pp.114-115.

[151] ibid, pp.116-117.

[152] ibid, p.57.

[153] ibid.

[154] ibid, p.115-117.

[155] ibid, pp.90-120.

Applying this to how EU law operates within the *ultimate* rules comprising the UK constitution, it is possible to distinguish two sets of officials. There are judges applying EU law in UK courts, and judges in the CJEU who possess an interpretive monopoly over the reading of EU law pursuant to Article 19 TEU. In order to establish a *functional* rather than merely *hierarchical* understanding of legal systems, it is necessary to observe these officials whose actions reveal which rules apply.[156] Because this analysis treats the Union as a legal system,[157] it is necessary to understand that in the complicated picture that emerges, those judges applying the law between the CJEU and the UK courts operate in 'concentric circles' rather than seemingly hierarchical chains, though that means that those at the nucleus (the EU officials) will have a superior impact and understanding than those at the perimeter fringes (the UK officials).[158] Those officials have a somewhat different opinion – the reason for complying with Union law for the EU officials is primacy, thus placing EU law as the supreme criterion in the UK system, whereas UK judges have attempted consistently to hold that EU norms bind as a result of an enabling statute, the European Communities Act (ECA) 1972. The latter view is consonant with the *supreme* criterion having never changed as a result of Union membership because Parliament could always repeal said Act.[159] This relationship is characterised herein as a 'clash of officials'. It is submitted that UK judges have been saying one thing while doing another, *i.e.* applying Union law as supreme in the UK constitution, despite claiming no change in the rules of recognition. However, the impact of Union law on the fundamental norm of the UK constitution can be demonstrated by the alteration in '…the practices of national [UK] courts in actually recognising, applying, and granting primacy to some of the norms of that [EU] legal system.'[160] Once the UK officials admit that EU law applies in the UK pursuant to the special nature of that form of law, combined with the tacit acceptance of the sovereignty transfer that has occurred over the course of the UK's membership, there will be a *consensus ad idem* (meeting of minds) between the officials of the EU legal system and the UK sub-system. Because the EU officials have been consistent in their understanding and application of supremacy,[161] the UK officials must only apply this understanding once for the clash to be resolved.[162] But before demonstrating this, it must be shown how the UK officials tried to maintain the façade that Parliamentary statute still maintains legislative supremacy, and thus that the '…fundamental [constitutional] structure[-s]…'[163] of the UK remained unperturbed by Union membership.

2.3 *'Doublethink'* in the UK courts

The approach of the UK courts to EU primacy can be characterised as *'doublethink'*: in Orwell's *1984,* this is the '…power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.'[164] This action is intentional, though the false

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[156] CULVER, GIUDICE, *supra* note 116, pp.5-6.

[157] Section 1.3.

[158] A. MARMOR, *Positive Law and Objective Values*, 1st ed., Oxford University Press: Oxford, 2001, p.17.

[159] CRAIG, *supra* note 131, p.46.

[160] DICKSON, *supra* note 99, p.20.

[161] Section 2.1.

[162] As they do in *Miller*, *supra* note 8, paragraph 65.

[163] Article 4(2) TEU.

[164] G. ORWELL, *Nineteen Eighty-Four,* Penguin Classics: London, 2000, p.244.

belief itself is quite real in the official's mind.[165] The two inconsistent beliefs are legislative supremacy of Parliament as the *supreme rule* in the UK legal system, and EU primacy. The first time these two were brought into conflict was in the *Factortame* saga.[166] Here, an Act of Parliament (the Merchant Shipping Act 1988) provided restrictions on fishing vessels operating in British waters, by stipulating nationality requirements. Because such provisions were directly contrary to non-discrimination requirements on grounds of nationality under the Treaty, the applicant (Factortame) sought 'interim relief' in the form of compensation while seeking to annul the inconsistent national legislation – though the Divisional Court were initially unconvinced of this possibility.[167] The House of Lords also denied that suspension of the statute was within the purview of the courts' powers,[168] then the Court of Justice affirmed the duty of national courts to dis-apply inconsistent legislation in favour of Union rights.[169] Therefore, in *Factortame (No.2)* Lord Bridge stated unequivocally that supremacy of Union law was confirmed in the ECJ case law '…long before the UK joined the Community.'[170] It follows from this that it is incumbent on UK judges to overturn 'any rule of national law'[171] clashing with Union law. Moreover, the ability of the court in that case to provide '…interim relief [and in similarly] appropriate cases is no more than a logical recognition of that supremacy.'[172]

The tangible application of Union supremacy as an abnegation of statute is nothing short of a 'technical revolution'.[173] For Wade, the ongoing membership of the Union represents acceptance of superior norms, to the extent that Dicey's original article[174] (and the orthodox definition of Parliamentary sovereignty) is qualified: Parliament's capacity to create *any* law, and the absence of any institution which can *supersede* its legislation are patently false while the UK remains a member of the Union.[175] Parliament is prevented from legislating contrary to Union law and the courts may overrule any statute that is inconsistent, thus aligning the UK constitution with the supremacy emphasised in *Simmenthal.* The alteration in the *supreme rule* of recognition is seen insofar as the 1988 Parliament's work has been undone due to the obligation undertaken by the 1972 Parliament, which enacted the ECA – Wade uses this to show that Hart's rule of recognition is a social fact, in that officials (here judges) take the initiative to adapt their practices in novel scenarios.[176] Though this account must be nuanced because Wade *hints* that the decision of the 1972 Parliament binds, suggesting *potentially* that EU law derives its validity domestically in that statute, rather than by virtue of Union law itself. Once this is modified,[177] it is evident that the new *supreme* rule

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[165] ibid, pp.244, pp.40-41.

[166] *R v Secretary of State for Transport, ex parte Factortame (No.1)* [1989] 2 Common Market Law Review 353.

[167] ibid, para 20 [Lord Donaldson].

[168] *R v Secretary of State for Transport, ex parte Factortame (No.1)* [1990] 2 AC 85, 135.

[169] Judgment of 19 June 1990*, R v Secretary of State for Transport, ex parte Factortame,* C-213/89*,* EU:C:1990:257, paras.18-20.

[170] *R v Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 AC 603, p.658-659.

[171] ibid, p.659.

[172] ibid, p.658-670.

[173] WADE, *supra* note 148, p.574.

[174] DICEY, *supra* note 145.

[175] WADE, *supra* note 148, pp.568-575.

[176] ibid, p.574.

[177] The distinction between the *supreme* rule and other rules of recognition is demonstrated in Section 2.2.1, whereas the Union as validating source of domestic law is shown in Sections 3.1-3.2.

of Union law is established – national courts are bound to apply it as such, a direct result of the Union legal system.

Despite the unequivocal acceptance of Union supremacy in *Factortame*, it is possible to trace two waves of *'doublethink'* in UK constitutional doctrine. Notably, both attempts to negate the supremacy of Union law over constitutional law reveal which of the contrary beliefs, *i.e.* EU supremacy rather than Parliamentary sovereignty, is truly accepted. To understand this, Hart's theory of official acceptance needs to be modified to account for the fact that it is possible to have 'acceptance…held *independent* of…belief…'.[178] In essence, UK judges may accept EU law ranking supreme over UK constitutional law for many reasons, so that the reason for their belief may shift according to context, which is logical given that it is possible to both believe and accept a proposition without the acceptance stemming directly from that belief.[179] This account suggests that the dicta of judges in several constitutional cases relating to the effect of EU law reveal a spectrum of beliefs. However, their varying beliefs do not alter the fact that acceptance remains consistent as EU law has continued to operate above Parliamentary sovereignty in the rule of recognition.

The first belief is predicated on a hypothetical. In *Macarthy's v Smith,*[180] Lord Denning suggested that, in applying Union rights to statutory legislation, the Treaties are a prevailing 'aid to…construction'.[181] This fails to capture the obligatory nature of Union law, suggesting instead that such norms create one of many interpretative rules of recognition, which is ultimately validated by Parliamentary legislation. Parliament's hypothetical 'final say' is suggested by Denning's claim that if Parliament created an Act which expressly repudiated law from the Treaties, '…it would be the duty of our [UK] courts to follow the statute of our Parliament.'[182] Such a claim is wrong in that such a scenario was too abstract to be envisioned. Firstly, Denning himself in *Macarthy's* did not consider it likely.[183] Indeed, such an event would undermine the effectiveness of Union law. More fundamentally, such a case could not happen. *Factortame* shows that Union law must operate above any inconsistent Parliamentary legislation. As a Member State, this cannot simply be ignored when convenient. This is because '…sovereignty is not a quality like baldness, a matter of degree, but more akin to virginity, a quality that is either present or absent.'[184] The supremacy of EU law is unstoppable – Lord Denning himself acknowledged earlier that EU law '…is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law.'[185] Though this definition still focuses on Parliament's choice, it is an earlier example of the idea that Union law validates national law.[186] Therefore, the reality is a transfer of sovereignty. Primacy must be accepted because '…Community law imposes it because of

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[178] A. PERRY, 'The Internal Aspect of Social Rules', (2015) 35(2), Oxford Journal of Legal Studies, p.294.

[179] ibid, pp.290-295.

[180] *Macarthy's Ltd v Smith* [1979] ICR 785.

[181] ibid, p.789.

[182] ibid.

[183] ibid.

[184] BOGDANOR, *supra* note 137, p.6.

[185] *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, p.418.

[186] C. MAC AMHLAIGH, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit', (2019) 21, *Cambridge Yearbook of European Legal Studies*, p.47.

its very nature, and the aims of European integration, and because the Treaty implicitly says so.'[187]

The second form of *'doublethink'* is the belief that Union law affects UK constitutional law as a difference in *degree*, rather than *kind*. In *Thoburn v Sunderland City Council*,[188] which concerned the transposition of a directive relating to retail units of measurement, the High Court denied that a statute concerning such measures impliedly repealed the ECA 1972 because it came later – the orthodox view of Parliamentary sovereignty has allowed Parliament to repeal previous conflicting statutes without using express wording, the only requirement of 'form' being a contrary intention.[189] However, the ECA 1972 was deemed a 'constitutional statute' because it has had 'profound effects' on the lives of citizens and therefore may only be repealed *expressly*.[190] The judges seemed to believe in a version of Parliamentary sovereignty modified by the common law, rather than an abnegation of Parliamentary sovereignty in favour of *supreme* rule of Union law. This view was bolstered in the *HS2 case*[191] with Lord Justice Laws suggesting again that these different categories of 'constitutional statutes' operate hierarchically, balancing between such sources as the ECA 1972, the HRA 1998 and the Magna Carta.[192] The positioning of certain statutes as *higher* rules of validity demonstrates a nuancing of Dicey's original theory which was '…a constitutional landscape of unrelenting normative flatness…'[193] where the account in *HS2* builds on *Thoburn* in demonstrating '…a far richer constitutional order…'.[194] However, while such accounts may seem *prima facie* convincing, the state-based perspective is myopic, by honing in particularly on the requirements of 'form' which substantive change to the constitution may require from a UK perspective. This is why the judges in *Thoburn* thought Eleanor Sharpston QC '…had gone rogue…'[195] by stating the obvious, from the perspective of the EU official, that implementing statutes such as the ECA 1972 did not validate EU law in the UK constitution, but rather the autonomous, supreme and unique legal system of the Union itself was the source.[196] Therefore, the Union legal system, viewed from its perspective, is a difference in *kind*, not degree. It would take until the *Miller* case reached the Supreme Court in 2017 for UK judges to finally align their reasoning with the EU judges, and thus recognise the reality of what Ms Sharpston had lucidly communicated in *Thoburn*:

'So long as the UK remains a Member State, the pre-accession model of Parliamentary sovereignty is of historical, but not actual, significance.'[197]

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[187] CLAES, *supra* note 41, p.247.

[188] *Thoburn v Sunderland City Council* [2002] 1 Common Market Law Review 50.

[189] ibid, para 63.

[190] ibid, paras 62-63.

[191] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

[192] ibid, paras 206-207.

[193] M. ELLIOTT, 'Reflections on the HS2 case: a hierarchy of domestic constitutional norms and the qualified primacy of EU law', UK Constitutional Law Association, 23 January 2014, retrieved 4th August 2022, <https://ukconstitutionallaw.org/2014/01/23/mark-elliott-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/>.

[194] ibid.

[195] J. MURKENS, 'Mixed Messages in Bottles: the European Union, Devolution, and the Future of the Constitution', 2017 80(4), Modern Law Review, p.687.

[196] *Thoburn*, *supra* note 188, para 53.

[197] ibid.

Or, from the Union perspective, Parliament has been 'dethroned'.[198]

3. Miller, the rule of recognition, the EU legal order: old suspicions confirmed?

If the UK were ever to have a 'critical constitutional moment'[199] regarding the nature of the relationship between itself and Union law, the Supreme Court judgment in *R (on the application of Miller) v Secretary of State for Exiting the European Union* fits the bill. The case reveals the final twist in the tale of the 47-year drama which has been the UK's membership of the Union. Though for those of us who had read up on the plot, the final act came as no surprise.[200] Because of the '…independent and overriding…'[201] nature of EU law, the UK's entry into the Treaties replaced Parliamentary sovereignty with a new *supreme* rule of recognition: supreme Union law. Thus, the constitution was fundamentally altered.

The case turned on whether the Prime Minister (or, the executive branch of government), could unilaterally trigger Article 50 TEU, thus beginning the withdrawal process from the EU. The Prime Minister's capacity to act on the international plane rests on a constitutional oddity, the Royal Prerogative(s). These are powers previously exercised by the monarchy, which are 'recognised' as legally practicable through government ministers.[202] A prerogative is used by senior officials in government to achieve an act on behalf of the Crown. However, without a codified list detailing which prerogatives exist, there is confusion and even misattribution.[203] The relevant prerogative in this case was the foreign powers prerogative, used for the entry and exit of international treaties. The majority judgment held that when constitutional change is necessary '…and statute has not provided for that change, … [it] must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.'[204] However, if read with the correct interpretation of Hart's *supreme* rule of recognition, the dicta of the majority is more consonant with the conclusion arrived at by the minority (dissenting) judges. This reinforces AG Sharpston's view which was dismissed as heterodox[205] only fourteen years' prior, that Union membership renders the classic view of Parliamentary sovereignty insignificant.[206] *Miller* closes the chapter on one controversial quandary of the constitutional relationship between EU law and Member States, marking '…the culmination of a peculiarly British struggle with the validity of EU law just as its application looks set to end.'[207]

The most important discussion in the case for the sake of this inquiry relates to the source of EU law, particularly how it takes domestic effect. This debate asks: on what authority

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[198] TOMUSCHAT, *supra* note 101, p.50.

[199] MURKENS, *supra* note 195, p.685.

[200] Section 1.3, Section 2.

[201] *Miller*, *supra* note 8, paragraph 65.

[202] MUNRO, *supra* note 143, p.256.

[203] H.W.R WADE, *Constitutional Fundamentals*, Sweet and Maxwell: London, 1989, pp.58-66.

[204] *Miller, supra* note 8, paragraph 121.

[205] MURKENS, *supra* note 195, p.687.

[206] *Thoburn, supra* note 188, para 53.

[207] MURKENS, *supra* note 195, p.686.

does Union law rest, domestic constitutional arrangements or by virtue of the Union legal system itself? This judgment provided the perfect moment to cede the truth of the matter: one has to win out, both cannot claim 'creative disagreement'.[208] The acceptance of EU primacy and the change this brought about within the ultimate rule of recognition (permanent shifting of the *supreme* rule and re-ordering other rules of recognition) might have been wanting in the *'doublethink'* of UK judges over a number of constitutional cases. Their comments (sometimes in dissent or on the *fringes* of law) belied the reality of what EU membership entails when primacy trumps Parliamentary sovereignty. However, the precision in *Miller* with which the autonomy of EU law is *believed* and *accepted*[209] by the officials is arresting.

3.1 The rule of recognition and constitutional change

As with many ground-breaking cases, the significance of the litigation was concealed behind the challenge – in asking whether triggering Article 50 TEU necessitated further statutory approval, the Supreme Court elucidated the exact effect of EU law on the UK constitution, and the origin thereof. Hartian jurisprudence featured in both the majority and minority judgments, though it had an explanatory, rather than a determinative value, used to accentuate the profound impact that beginning the withdrawal process would have on UK constitutional arrangements.[210] It is unsurprising that Hart's legal philosophy was deployed given that the case raised '…serious legal and philosophical questions about the most fundamental building blocks of the constitution.'[211] Although in summoning the rule of recognition, both the majority and the minority judges were incorrect in their usage. In referring to constitutional change, the judges invoked a singular rule of recognition, ignoring both the plurality in the rules, and the existence of a top rule.[212] Indeed, Phillipson suggests that the Supreme Court treated the singular rule as synonymous of the *supreme criterion*, which is Parliamentary sovereignty.[213] This reading allows for the majority's reasoning to be nuanced by acknowledging the numerous changes in the rule of recognition which occurred by Union law: incorporating a new type of law in the UK constitution, prioritising EU law which has direct effect over later Acts of Parliament, and crowning the CJEU as the authority for the interpretation of Union law.[214] However, what commentators[215] fail to notice is that these three distinctive elements of Union law (novelty, priority, and interpretative monopoly) were present well before the UK became a Member State and operated truly independently of any implementing legislation.[216] Phillipson hints at this in noting that the ECA 1972 reveals a distinctiveness in the EU-domestic law rapport, in so far as this legislation was directly influenced by the direct effect of EU law rights in section 2(1) and the overriding supremacy of Union law in section 2(4).[217]

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[208] TRIDIMAS, *supra* note 83, p.418.

[209] PERRY, *supra* note 178, pp.290-296.

[210] *Miller, supra* note 8, paragraph 173.

[211] CRAIG, *supra* note 131, p.45.

[212] *supra* note 134.

[213] PHILLIPSON, *supra* note 130, pp.70-71.

[214] ibid.

[215] M. ELLIOTT, 'The Supreme Court's judgment in Miller: in search of constitutional principle', (2017) 76(2), Cambridge Law Journal, pp.257-288.

[216] Section 2.1.

[217] PHILLIPSON, *supra* note 130, p.73.

However, though Phillipson is unique in pointing out this often-ignored factor, there should be another step in his reasoning which proves the distinctiveness of this interaction, and thus the profound change in the rule of recognition that occurs following Union membership. The unique constitutional features of Union law not only pre-determine the content of implementing legislation or acts that Member States use to 'enact',[218] but they take effect *regardless* of an implementing Act. The unique impact of Union law lies in its immediacy in abrogating inconsistent provisions of national constitutions. This is not speculation – the irrelevance of the statute in giving effect to Union law is confirmed in Lord Reed's lucid dissent.[219] Lord Reed pointed to the wording of section 2(1) of the ECA 1972 which refers to '…All such rights, powers, liabilities, obligations and restrictions ***from time to time*** created or arising by or under the Treaties'. This demonstrates the *conditional* nature of the Act, because it was dependent on the extraneous act of the UK government acceding to the Treaties; thus the ECA 1972 '…imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU.'[220] When combined with the notion of the rights '…in accordance with the Treaties…[being] without further legal enactment…' (section 2(1) of the same Act) being legally effective in the UK, the classic *Van Gend en Loos* orthodoxy of direct effect and direct applicability *'…if and for so long as the Treaties apply to the UK…'*[221] is confirmed, and any statutory approval fades into irrelevance. The effect of Union law in the UK was not dependent on statute. For Lord Reed, the conditionality argument entailed that the ECA 1972 was empty until the UK government ratified the accession Treaties; thus making the prerogative the correct way to switch 'on' or 'off' the '…body of law now known as EU law…',[222] which like *water or electricity* may run through the 'conduit pipe'[223] of the ECA 1972. For present purposes the significance lies in the fact that if empirically proven, this shows that while the extrinsic act of entering into Treaties flicked on the switch of Union law, that law took effect *instantly* by virtue of its own constitutional and directly applicable nature. Such a point is strengthened by the majority's statement that the EU institutions decided the *content* of what flowed through the 'conduit pipe'.[224] This instantaneous process required no Act of Parliament, therefore EU law took supreme place at the top of the UK constitution, without any parliamentary intervention. Lord Reed's *coup de grâce* was in proving this thesis by noting that in the period between the entry into force of the 1972 Act (17 October 1972) and the ratification of the Treaty of Accession via prerogative (1 January 1973), there was no domestic impact of EU law.[225] Thus, the change in the rule of recognition is even more radical than Lord Bridge's view in *Factortame*, as characterised by Wade in terms of Parliament 'fettering' future formations of Parliament.[226] Parliament did not even have a say in the matter, when EU law knocked it from the top spot.

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[218] Used in the loosest sense here, since the EU norm does not derive its validity from national law (*infra* Section 3.2).

[219] *Miller*, *supra* note 8, particularly paragraphs 179-204 [Lord Reed].

[220] ibid, paragraph 177.

[221] ibid, paragraph 190 [emphasis added].

[222] ibid, paragraph 216.

[223] This metaphor was originally proposed by John Finnis, then adopted by the judges: J. FINNIS, Brexit and the Balance of Our Constitution, 2 December 2016, retrieved 16th July 2022, <https://judicialpowerproject.org.uk/john-finnis-brexit-and-the-balance-of-our-constitution/>, page 22.

[224] *Miller, supra* note 8, paragraph 84.

[225] ibid, paragraph 192.

[226] WADE, *supra* note 148, p.574.

3.2 Validity, source and consensus of officials

By admitting that Union law is an independent source, the majority represents a shift in the UK officials wherein consensus is finally reached with the EU officials. This is because in recognising the validity of EU law from a Union perspective, the Supreme Court '…let[s] the EU genie out of the bottle.'[227] As if simplifying its task, the Court casts aside *'doublethink'* in recognising that the validity of Union norms depends not on any action of a UK institution, but rather '…where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law.'[228] This is symbolic, for it shows that when assessing the impact of this source of law, the UK courts no longer attempt to maintain '…the formal veneer of Diceyan orthodoxy while undermining its substance'.[229] Such was the case in *Thoburn* when the UK High Court claimed that 'English law' formed the foundation of the relationship between the Union and Britain [UK].[230] This institutional application from the Union perspective recognises the power transfer which has taken place, in that '…institutions of the EU can create or abrogate rules of law which will then apply domestically, without the specific sanction of any UK institution.'[231] Problematically however, the majority contradicts this reasoning through continued reliance on the statute itself. This flaw is highlighted plainly by Mark Elliott – if EU law is a source of domestic law both 'overriding' and 'independent',[232] the fact of its independence stems from the fact that its validity does not presuppose '*acknowledgement by other sources of law*, such as UK legislation'.[233] This directly contradicts the statement made by the majority, that the validity (the judges use the word 'status') of EU law depends on ECA 1972.[234] The UK officials seem to be falling back into old habits here. Constitutional lawyers frequently try to 'square' a traditional notion of Parliamentary legislative supremacy with the alteration cause by Union supremacy, seeking to assert facts that are no longer true.[235] Perhaps this is simply a final attempt to accept EU supremacy while paying homage to UK 'constitutional claims'.[236]

Nonetheless, it is still possible to square the circle, by showing that claiming statute as the derivation of the effect of EU law is little more than fighting talk. To suggest otherwise would be to denigrate one of the strongest and clearest concessions of the true nature and effect of EU law on national constitutional identity. However, in making such a bold assertion, it would follow that in re-ordering the hierarchy to the extent that UK law is fully subordinate to Union law, the former has derived its own validity from the latter, for the duration of the UK's membership.[237] Such an essentially *monist* claim, would require that the UK application of

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[227] MURKENS, *supra* note 195, p.688.

[228] *Miller, supra* note 8, paragraph 61.

[229] P. CRAIG, 'Sovereignty of the United Kingdom after *Factortame*', (1991) 11(1), Yearbook of European Law, p.251.

[230] *Thoburn*, *supra* note 188, paragraph 66.

[231] *Miller, supra* note 8, paragraph 61.

[232] ibid, paragraphs 65, 80.

[233] ELLIOTT, *supra* note 215, p.272.

[234] *Miller*, *supra* note 8, paragraphs 60-61, 227.

[235] N.W. BARBER, 'The afterlife of Parliamentary sovereignty', (2011) 9(1), International Journal of Constitutional Law, p.152; *also* M. KUMM, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', (2005) 11(3), European Law Journal, p.266.

[236] MAC AMHLAIGH, *supra* note 186, p.49.

[237] ibid, p.47.

Union law reflects closely those '…original "constitutionalising" judgments…'[238] of the CJEU, which while the Court of Justice never made the connection between its pronouncements on supremacy (primacy) and the norms of EU law, therefore providing the validity of national law, this commentary suggests it is entirely possible. This is consonant with the theory of a Union legal system that one day aims to replace those 'sub-systems' comprising it.[239] Taking again a *functional* perspective,[240] regardless of dicta pertinent to the ECA 1972, *Miller* demonstrates the officials of UK law acting directly *as if they were* Union officials. Semantically speaking, the *source* of EU law can be synonymous with the 'origin' or the 'authorisation'.[241] Where the source is the institutions, and so too is the authorisation, it follows that the only claim the ECA 1972 can make is to 'recognise' (rather than to 'constitute') EU law as a source of law which is 'independent' and 'overriding'.[242] This vindicates Reed's argument that the statute itself is devoid of both content and obligation.[243] Rather than obsessing over the so-called 'incorporating statute', the official-based theory of law looks to facts. In deriving the validity of a norm, it is pertinent to observe:

> 'The reasons for enforcing the norm, and the *attitude of the courts*…to its enforcement, are the crucial factors...Ultimately the problem turns on an *accumulation of evidence* justifying a judgement whether a norm is enforced on the grounds that it is part of the law's function to support other social systems or because it is part of the law itself.'[244]

Therefore, the actions of those officials at the top reveal the truth. The European Communities Act 1972 might have been a 'catalyst' for a swing in acceptance by citizens of the new criterion.[245] However, the statute itself did not alter the rule of recognition.[246]

The fact that the judges act here as EU officials is compounded by the wording, because the Supreme Court '…defied the doctrine of parliamentary sovereignty by aligning its case law with the ECJ's famous words in *Costa…*'[247] by characterising Union law as 'independent'[248] and therefore not subject to abrogation by domestic legislation. The judges as officials now recognise the validity of EU law by virtue of that law, and operate thusly as a proxy for Union officials, whose knowledge of the application of Union law is supreme.[249] This meeting of minds is not, as Murkens claims, throwing '…orthodoxy out of the window.'[250] Rather it is the recognition of UK law being validated on the basis of EU law. Accordingly, the *supreme* criterion of the UK constitution was recognised as Union law.

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[238] ibid.

[239] *See*: Section 1.3.

[240] CULVER, GIUDICE, *supra* note 116, pp.5-6.

[241] T. POOLE, 'Devotion to Legalism: On the Brexit Case', (2017) 80(4), Modern Law Review, p.702.

[242] MURKENS, *supra* note 195, p.688.

[243] *Miller, supra* note 8, paragraph 177.

[244] RAZ, *supra* note 64, p.102 [emphasis added].

[245] P. CRAIG, '*Miller*, Structural Constitutional Review and the Limits of Prerogative Power', (2017) Brexit Special Extra Issue, Public Law, p.65.

[246] ibid.

[247] MURKENS, *supra* note 195, p.688.

[248] *Again* Article 19 TEU.

[249] MARMOR, *supra* note 158, p.17.

[250] MURKENS, *supra* note 195, p.687.

Parliament's legislative powers remained significant as *a* rule of recognition during the UK's membership of the Union. The *chains of validity*[251] analysis is instructive: norms that conflicted with the rule of recognition of parliamentary sovereignty could not be recognised as valid unless legislated for by Parliament (*see*: the HRA 1998), however it has been possible for rules to be seen as valid despite conflicting with Parliamentary sovereignty, for as long as they do not conflict with EU law (here: the application of primacy in *Factortame*). Therefore, though Parliamentary sovereignty ranked highly among the rules of recognition, it was European Union law by virtue of its unique features which ranked as the *supreme criterion*. It did so not by virtue of statute, but by virtue of EU law. Therefore, the fundamental structure of national constitutional identity in the UK was profoundly altered as a result of membership. The combination of '…obedience by ordinary citizens and…acceptance by officials of secondary rules as critical common standards of official behaviour…'[252] evidences this change emphatically.

3.3 'Constitutional requirements' for exit and the Union legal order

The potential *Achilles' heel* of the argument that the Supreme Court revealed the supremacy of Union law over the UK's constitutional structure pertains to Parliament's ongoing supremacy – that, as long as Parliament can legislate to leave the Union, it remains the top rule.[253] However, such a view is incorrect. Article 50 TEU is a unique process, and the fact that the UK's requirements involve Parliamentary approval does not negate the overall supremacy of Union law. Rather, it reflects a residual power left to Member States to leave.

Firstly, the requirement to exit the Union in compliance with 'constitutional requirements'[254] is a corollary of the capacity of Member States (fulfilling accession requirements) to join the Union.[255] This was emphasised in the *Wightman* case which typified such requirements as representative of a Member State's '…sovereign choice.'[256] Effectively, it could be illogical to impose a myriad of requirements on exit which would undermine the unilateral nature of the decision to leave. Indeed, the author asserts that the fact that those 'constitutional requirements' were deemed in the UK to be Parliamentary approval could reflect a conditional shift to Parliament as the necessary rule for exiting the Union, though not what some commentators[257] have called a robust re-enforcement of Parliamentary supremacy. In that sense, the choice of Parliamentary approval is incidental to the bigger picture. The EU legal system could not make the exceptional claims made vis-à-vis Member States' constituent sub-systems without allowing a 'get-out' clause. Moreover, it is the great import of Article 50 TEU as the only means of unilaterally halting further integration in a given Member State. The UK provides an ample case study, in that regard.

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[251] HART, *supra* note 7, p.107.

[252] ibid, p.117.

[253] CRAIG, *supra* note 131, p.46.

[254] Article 50(1) TEU.

[255] P. CRAIG, 'EU Membership: Legal and Substantive Dimensions', DELI Annual Lecture given at Durham Law School, University of Durham, 14 February 2020.

[256] Judgment of 10 December 2018, *Wightman v Secretary of State for Exiting the European Union,* C-621/18, EU:C:2018:999, para.50.

[257] K. EWING, 'Brexit and Parliamentary Sovereignty', (2017) 80(4), Modern Law Review, pp.711-726.

Secondly, the process for exiting is fundamentally dictated by European requirements.[258] Just like Garben's notion of *'Europeanized'*[259] standards, the exit process takes place through a Treaty article, and it is incumbent on authorities to approach the matter as an *evolving process*, not a *fait accompli*, which must continuously consider various rights claims under EU law which may be lost by EU citizens residing in the UK, or UK citizens themselves.[260] Therefore, while the text of Article 50 TEU is relatively bare, it requires a 'constitutionalist' interpretation which incorporates not only the requirements of the exiting state, but also the a Union-centric interpretation of fundamental rights.[261] The sheer controversy[262] surrounding *Miller* and 'constitutional requirements' in the UK might signal a state whose integration into the Union legal system led it to question its own NCI. Union law has always been accepted as supreme in the UK, though sometimes the beliefs which fed into this acceptance clashed.[263] The diversity of opinions in case law and academia on how EU law takes effect on the UK constitution are perhaps the best way of demonstrating the confusion engendered by seeking to opt-out of an 'ever closer Union'. In creating this confused picture, we must not lose sight of the hierarchy which tempered the relationship between the European Union and the United Kingdom. We must not forget the '*pacific judicial revolution*'[264] which took place in *Van Gend en Loos*.

4. Conclusion

European integration is a difficult pill to swallow for some Member States. In attempting to insulate elements of their constitution beyond European harmonisation, Member States are said to be undertaking the task of trying to set the boundaries of primacy.[265] As a means of protecting national constitutional identity, Article 4(2) TEU is the most recent Treaty-based iteration of this aim. However, it is not in the capacity of Member States to modify the classic doctrine of primacy and 'act *contra legem europaeum'*.[266] The introduction highlighted six themes,[267] and this article has emphasised the existence and interplay of these ideas throughout. However, it is in reflecting on those in bold that we conclude. As an evolving project, the notion of an 'ever closer Union' **(3)** should sit in exact contrast to the aim of protecting NCI under Article 4(2) TEU **(5)**. The UK example has been the prism through which this analysis took hold. Using Hart's analytic jurisprudence, the author built a theory in Sections 1 and 2 which led to the following supposition: if the most fundamental constitutional rule in the UK system can be displaced simply by virtue of Union membership, the defensive[268] aims of Article 4(2) TEU to halt further integration are

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[258] D. DIXON, 'Article 50 and Member State sovereignty', (2018) 19(4), *German Law Journal*, p.940.

[259] GARBEN, *supra* note 20, p.51.

[260] P. EECKHOUT, E. FRANTZIOU, 'Brexit and Article 50 TEU: a constitutionalist reading', (2017) 54(3), Common Market Law Review, pp.698-701.

[261] ibid, pp.696 and *passim*.

[262] G. PHILLIPSON, 'Enemies of the people: MPs and press gang up on the constitution over High Court Brexit ruling', The Conversation, 4 November 2016, retrieved 16th February 2020, <https://theconversation.com/enemies-of-the-people-mps-and-press-gang-up-on-the-constitution-over-high-court-brexit-ruling-68241>.

[263] PERRY, *supra* note 178, pp.290-296.

[264] LECOURT, *supra* note 95, p.7.

[265] VON BOGDANDY, SCHILL, *supra* note 30, p.1419.

[266] GARBEN, *supra* note 20, p.51.

[267] *See*: Introduction.

[268] FABBRINI, SAJÓ, *supra* note 6, pp.469-473.

unachievable, rendering it '…a dead letter.'[269] Using an analysis of the controversial *Miller* litigation, the first use of Article 50 TEU as a means of unilaterally halting integration by exiting the Union, the supposition was demonstrated to be the truth. The incompatibility of points **(3)** and **(5)** buttress the claim made in point **(6)**. European Union law has a *revolutionary* impact on national constitutions and the *anarchy* which has taken place in the UK should serve as a necessary, though perhaps uncomfortable, lesson to rebellious national constitutional courts: either you accept it, or you move on.

[269] SPIEKER, *supra* note 18, p.384.

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