BREXIT IN THE HIGH COURT AND SUPREME COURT: AN EVALUATION IN LIGHT OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

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Introduction and Background

On 23 June 2016, a referendum was held to decide on the UK's membership of the EU. Although the result was slim and a cliff-hanger – in which only 52 per cent voted Leave – turnout at 72.2 per cent[1] represented a figure higher than the general election average.[2] The referendum embodied former Prime Minister, David Cameron's promise made at Bloomberg speech in 2013 in which he made an avowed commitment to give the British people a say on UK's membership of the EU. Cameron's victory in the 2015 general election enabled him to carry out the pledge (which was also written into the Conservative party manifesto). The European Union (Referendum) Act 2015[3] was passed soon after[4] which provided for the statutory and constitutional basis for the 'In/ Out' Referendum (hereinafter 'the Referendum'). The Act perhaps offered the clearest example of the deference of parliamentary sovereignty to popular or political sovereignty (*i.e.* of the people) as the final or ultimate basis of the Constitution[5] since the referendum of the 1975 over membership of what was then the Common Market of the European Economic Community (EEC).

In turn, the result of the Referendum was quickly succeeded by a seminal court case brought by two foreign-born EU citizens, namely Ms Gina Miller and Mr Deir Dos Santos. In case of *Gina Miller & Deir Dos Santos v Secretary of State for Exiting the European Union* [2016] (hereafter to be referred to as the *Miller* case), the three-bench Administrative Court of the

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[1] The Electoral Commission <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>.

[2] Interestingly, the snap general election called by Prime Minister Theresa May and approved by Parliament under the Fixed-term Parliament Act (2011) which succeeded the In/ Out Referendum was at 68.7 percent.

[3] http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted, accessed 13 September 2017.

[4] This was part of the Conservative party manifesto for the 2015 general election – to give the British people a say as to whether the country should leave or remain the EU. The last referendum was held in 1975 – on membership of the European Economic Community (EEC) that was then thought to be 'reducible' to the Common Market (*i.e.* to say, merely a free trade area albeit underpinned by the four freedoms of movement, including that of people – as was promoted by the then Conservative government under Edward Heath.

[5] That is to say, the sovereignty of the UK is not embodied or expressed in a Constitution precisely because it is unwritten or better still uncodified but in the concrete will of the people throughout history.

Queen's Bench Divisional Court[6] rejected the argument put forward by the Attorney General and counsel for the government in favour of the applicants. It was held that, contrary to government expectation, the Prime Minister indeed lack the authority to trigger Article 50 of the Lisbon Treaty (2007) (hereinafter to be referred to as 'Article 50') to initiate the withdrawal process in accordance with the will of the British people as embodied in the result of the Referendum. The case then went on appeal to the Supreme Court and the eleven member justices by a majority of 9 to two upheld the decision of the High Court.[7]

This essay intends to revisit the combined judgments of these courts and critically examine them against fundamental constitutional principles to justify a differing or contrary position. It is the position of this essay that the courts have erred in ruling that royal prerogative cannot be employed to trigger Article 50 in order to initiate the withdrawal process to actualise the mandate given by the British people in the Referendum for the UK to leave the EU.

"First Things First": Basic or Background Constitutional Position or Principles

The *Miller* case took place against the backdrop of the argument over fundamental constitutional principles. The battle over which was the constitutionally and proper way to trigger Article 50 was underpinned by differing understanding of how the dualistic nature of the Constitution applies in the context of the UK's membership of the EU.[8] That is to say, the question of whether the impact of EU membership on the country's Constitution is co-related to – in some ways at least – on the impact on the latter's withdrawal from the former.

The "ambiguous" and "indeterminate" characteristics of the UK Constitution allows or provide for certain "grey areas" that is bound to give rise to constitutional and legal disagreement and, by extension, disputes – none more so as in the *Miller* case. Before proceeding any further, it is pertinent and germane to the issue under consideration and review to re-visit some of the fundamental principles of the UK Constitution. As it is, the uncodified nature of the Constitution means that the sources of constitutional law is multi-source (*i.e.* derived from a

[6] *Gina Miller & Deir Dos Santos v Secretary of State for Exiting the European Union* [2016] EWHC 2678 (Admin). Source: <https://www.judiciary.uk/wp-content/uploads/2016/11/r-miller-v-secretary-of-state-for-exiting-eu-amended-20161122.pdf>.

[7] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5. Source: <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

[8] See, *e.g.* the transcript of the judicial review proceedings at the Administrative Court of the Queen's Bench Divisional Court of the High Court of Justice. Source: <https://www.judiciary.uk/wp-content/uploads/2016/10/20161013-all-day.pdf>.

plurality of sources) and in turn this is compatible or co-related with the concept and practice of parliamentary sovereignty.

As the Constitution therefore is equivalent to the ordinary laws of the land (*i.e.* in the form of the Acts of Parliament and common law) albeit not exclusively so (in reference to the supremacy of the EU law, primarily in the Treaties embodied in the Treaty of Rome as the foundational Constitution of the Union as well as the secondary sources particularly in the regulations and directives)[9], it is highly susceptible and "vulnerable" and open to political manipulation. And indeed the UK Constitution has been subject to the politics of the day and continues to be so. Constant change and conservation defines the "boundaries" of the UK Constitution. In fact, it could well be argued that the EU (Referendum) Act (2015) introduced a change into the Constitution by statutorily guaranteeing a referendum on the UK's membership of the EU – an event that was constitutionally and legally and politically inconceivable just a decade ago.

That is to say, the introduction and passing of the European Communities Act (1972) (hereafter to be referred to as the ECA 1972) had seemed to have "entrenched" the (semi-) "permanency" of EU law within the domestic Constitution and hence preserving and protecting the same legislation from repeal. By extension, this applies to the *acquis communautaire* (*i.e.* the entire body or *corpus* of EU law) – channelled and implemented on the basis of and subsequently through the ECA 1972 alongside the by-passing thereof from also being repealed. To be sure, the ECA as one of the "constitutional statutes" amongst others[10] is immune to implied repeal rather than express. Or to be more precise or rather to put in slightly differently, the ECA 1972 is politically entrenched rather than legally immune from repeal. The difference between the "political" and the "legal" is not meant to imply that that these two concepts can be severed as distinct wholes in their own right but that rather they are distinguishable as two co-relates or co-efficients or co-ordinating aspects/ dimensions of the UK Constitution.

[9] Royal prerogative would be subsumed under common law *re* its 'nature' and source.' The existence and extent of royal prerogative is defined by/ at common law and historically derived thereof. That is to say, royal prerogative co-existed with common law from the earliest of times and both are set within the wider common law tradition. In addition, the contemporaneity of both is also grounded in the early subordination and later on the application of the principles of the latter (*i.e.* common law) in limiting the extent of the former (*i.e.* royal prerogative) as embodied in the Magna Carta (1215). And so that common law not only determines the nature of the powers of royal prerogative as a matter of constitutional and legal principle but also defines the *nature* of the source as well.

[10] See the case of *R (HS2 Action Alliance) v Secretary of State for Transport* [2014)] UKSC 3. For a scholarly discussion, refer to Mikołaj Barczentewicz, 'Constitutional statutes still alive', [2014] Law Quarterly Review 557 Source: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831981>.

Thus, the "political" facet of the Constitution inter-faces with the "legal" such that the one impacts on the other but without subsumption. Both have their proper place and role within the Constitution and grounded in none other than parliamentary sovereignty as the central organising principle no less. To suggest, therefore, that the ECA 1972 is immune from implied or political repeal is to highlight that the legislation is a) subject to the voluntary self-imposed constraint of parliamentary sovereignty in acquiescence of the supremacy of EU law; and b) that this voluntary self-imposed constraint may legally and constitutionally be lifted or mitigated either in limited or its full extent either by directly by Parliament itself or indirectly by the court.

The other feature of the UK Constitution is its "dualist" character --- again grounded and conditioned by parliamentary sovereignty. This means that the UK Constitution's relationship with the international and the domestic operate differently. At the international level (*i.e.* laws pertaining to the UK as a member-state or country – where relevant and appropriate), it is the role of the Crown to act alone in relation to the international treaties. But at the domestic level (*i.e.* laws pertaining UK's own internal jurisdiction), it is for Parliament alone to determine or decide on the creation of laws and the conferring of legal rights. Hence, any application or implementation of international laws within the UK requires parliamentary consent and authorisation.

As stated heretofore, the legal controversy in the *Miller* case centred upon the crucial and critical question as to whether or not the triggering of Article 50 could be executed by the use of royal prerogative of Crown powers (alone) without parliamentary consent and authorisation. Since the triggering of Article 50 is an act that takes place on the international plane which belongs to the purview and jurisdiction of the Crown, it was argued that it is only proper and right for the Prime Minister should use royal prerogative accordingly.[11] Theresa May was only exercising the traditional role of the Crown in "un-signing" an international treaty which in this case relates to UK's membership of the EU. If the signing or entering into international treaties belong to royal prerogative (apart from parliamentary involvement), logically the *same* power

[11] Consult Mark Elliott, "On Why, as a Matter of Law, Triggering Article 50 Does not Require Parliament to Legislate' (*Public Law for Everyone*, 30 June 2016)
Source: <https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate>.

should also apply equally to the reversing the act and impact thereof. Such an argument is consistent and consonant with the "dualist" nature of the UK Constitution.

To be fair, such a view has to be balanced and tempered with the equally important position that the use of royal prerogative to reverse membership of an international treaty cannot and ought not to impact on the existence and operation of legal rights at the domestic level. Again such a view is equally consistent and consonant with the "dualist" nature of the UK Constitution. This paper will now seek to critically discuss the judgment of the High Court as well as the Supreme Court and attempt at a critique on the basis of the fundamental and background constitutional principles as have been outlined herein.

The Judgment of the High Court: In Favour of the Applicants

Perhaps unsurprisingly, the three-bench Administrative Court of the Queen's Bench Divisional Court of the High Court of Justice delivered their judgment in favour of the applicants (*i.e.* Gina Miller and Deir Dos Santos). The judges comprised of Lord Thomas of Cymgiedd (the Lord Chief Justice of England and Wales), Sir Terence Etherton (Master of the Rolls) and Lord Justice Sales. The central issue before the court was purely a matter of law. To repeat: This was whether or not the government is entitled to give notice of the UK's decision to leave the EU under Article 50 without reference to Parliament. The justiciability of the issue was never at any point in time challenged by the government.

The court accepted the submission of the applicants that the triggering of Article 50 by itself constitutes an act or measure that would lead to the removal of legal rights of EU citizens (both UK and non-UK) in the country – that is, the domestic law would be affected and impacted by such an act on the international plane. As such, the Prime Minister would need to seek authorisation from Parliament before the triggering of Article 50 can take place. Furthermore, it was argued, the very nature of the ECA 1972 precludes and pre-empts the triggering of Article 50 by the use of royal prerogative since it statutorily provides for and therefore expressly authorises the carrying out and implementation of "rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties."[12] Since the government is under such statutory obligation, the triggering of Article 50 would represent or constitute a direct violation and challenge to s2 of the ECA 1972. That is to say,

[12] European Communities Act (1972). Source: <https://www.legislation.gov.uk/ukpga/1972/68/section/2>.

as only Parliament can empower the government to implement and executive Treaty rights and obligations in domestic law, likewise only Parliament can undo such provisions

Intriguingly, the government firstly accepted that the triggering of Article 50 *per se* will have effect of changing domestic law by way of the removal of or impact on the legal rights enshrined for EU citizens. Secondly, the government then chose or adopted a position that is "subsumed" or dependent on parliamentary sovereignty. And which is namely that whatever legal authority to be exercised by the government in pursuant of the objectives and contents of the ECA 1972 is entirely grounded and derived thereof (*i.e.* from the same legislation itself). The court as it is rejected such argument as contrary to fundamental or background constitutional principles.

The court's thinking in turn required revisiting and highlighted the relationship between royal prerogative and parliamentary sovereignty. The court highlighted the *Case of Proclamations* in the form of the classical quote by Sir Edward Coke that:

> "The King hath no prerogative, but that which the
> law of the land allows him."[13]

The other case cited was *Re Zamora* [1916] and Article 1 of the Bill of Rights was also mentioned. Having reiterated the common law definition of royal prerogative as well as reconfirming the supremacy of Parliament from a "higher order" constitutional statute,[14] the court then went on consider the exercise of royal prerogative to make and unmake international treaties. It was the court's view that the there is a "direct link" between the impact of EU law on the UK at the international dimension and the impact of EU law on the UK at the domestic level. Again, the government relied on the sub-argument that the ECA never expressly intended to preclude the exercise of royal prerogative to carry out the obligations of the UK at the international level. In the end, the court insisted that – despite and contrary to the citation of the case of *ex parte Rees-Mogg*[15] in support of the use of royal prerogative relating to the signing (and by extension the un-signing) of international treaties, the ECA 1972 by way of section 2 expressly sets the condition of the implementation and force of domestic law as wholly

[13] *Case of Proclamations* [1611] 12 Co Rep 74.
[14] For the distinction between a "lower order" and "higher order" constitutional statute – that was absent in the judgment of Laws J in *Thoburn v Sunderland City Council* [2002] 1 CMLR 50, see *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] UKSC 3.
[15] *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Ree-Mogg* [1994] 2 WLR 115.

dependent on the "Treaties." This means once the link with the Treaty is broken and severed, domestic law itself would *not* have remained intact and inviolate. In short, the triggering Article 50 per se or by itself *will* lead to change or alteration of domestic law.

Critique of the High Court Judgment

The critique of the High Court judgment could framed thus – as in the turning the fundamental premise against itself. That is to say, the same basic premise and underlying assumption also represents an Achilles' heel for the court and by extension the claimants' argument. Undoubtedly, the concept or framework of a "direct link" is very difficult to be refuted or contradicted. The issue then turns upon the nature of the 'direct link' --- how it is to be conceived and construed. For according to the understanding of the court, "direct link" would represent an *unmediated* permanent relationship between EU law and Parliament such that any alteration of the relationship in "form" (*i.e. formal* status of domestic law - validity) would also affect the "substance" (*i.e. substantive* status of the law - applicability) thereof since there is no separation between the two (*i.e.* between form and substance) let alone distinction.

Hence, a fundamental alteration at the international level represented by the exercise of royal prerogative in triggering Article 50 would effectuate an identical or similar change at the domestic level. However, Parliament is not the source or origin of the substantive status of EU law (in principle and to a certain degree as *per* the regulations and directives, respectively as constituting the main or bulk sources of secondary EU law) but only of its formal status (*i.e.* in reference to the incorporation into domestic law). Therefore, Parliament serves only as the channel or conduit by which EU laws – as supra-national in substantive status – are incorporated and domesticated and formalised into domestic law. In short, Parliament is only responsible in so far as the granting of domestic status to EU laws.[16]

This means that the concept and framework of "direct link" should in this case necessarily imply and presuppose a *mediated* connection in which the formal and substantive status of EU

[16] See Mark Elliott and Hayley J. Hooper, "Critical Reflections on the High Court's Judgment in *R (Miller) v Secretary of State for Exiting the European Union* (2016)" (*UK Constitutional Law Association*). Source: <https://ukconstitutionallaw.org/2016/11/07/mark-elliot-and-hayley-hooper-critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union>. Consult also John Finnis, "Brief Observations on the Final Miller Judgment" (*Judicial Power Project*, 2018). Source: <https://judicialpowerproject.org.uk/john-finnis-postscript>. For an opposite view, please refer to John Rivers, "Brexit and Parliament: Doubting John Finnis's Dualism" (University of Bristol Law School Blog, 16 November 2016). Source: <https://legalresearch.blogs.bris.ac.uk/2016/11/brexit-and-parliament-doubting-john-finniss-dualism>.

law are (absolutely) distinguished albeit inseparable. It is the institution of Parliament – on the basis of parliamentary sovereignty – that mediates the substance of EU law into the domestic milieu with constitutional and legal import and ramifications with some adaptation and adjustments set within the context thereof. Thus, the substantive status of EU law (as supra-national law) is entirely and wholly dependent upon the mediation of Parliament for its incorporation – consistent with the dualist nature of the UK Constitution and as one of the fundamental or background constitutional principles. It has to be stated that, intriguingly, the High Court neglected or chose to overlook the dualist character of the Constitution in its judgment.

As such whilst the use of royal prerogative may excise the legal status of EU law at the international level, it remains constitutionally and legally impossible for the formal status of domestic to be automatically and by default altered correspondingly. Whilst a change in the formal status would affect the substantive status, it is not evident if such a change is *immediate* and *simultaneous*. This is to state that triggering of Article 50 by the use of prerogative powers would not by legal necessity lead to the contemporaneous or concurrent or concomitant removal of legal rights enshrined in EU primary and secondary sources of law.

Otherwise, this would imply that the incorporation of EU Treaties and their ancillary laws were automatically incorporated by Parliament – which would obviously contradict the pre-existing notion and practice of parliamentary sovereignty and being inconsistent with the dualist nature of the UK Constitution. For that which could be reversed by default would presuppose and imply that its original status was also installed by default. In other words, due to parliamentary sovereignty, the concept of "direct link" as unmediated only applies in terms of the substantive status but the formal status should be conceived and construed as being mediated *via* parliamentary sovereignty. In short, the "direct link" between EU law and domestic law is not unqualified and absolute but qualified and relative – subject to the dualist Constitution of the UK.

Having lost the case in the first instance, the government decided to appeal on the judgment. The appeal leapfrogged to the Supreme Court which heard the case in December – which would have been a relief to the government since it expects that the process for initiating the UK's withdrawal from the EU to start by end of March 2017. The eleven-member bench of the

Supreme Court was led by the President, Lord Neuberger, who also delivered the majority judgment with three judges dissenting.

The Judgment of the Supreme Court: Again in Favour of the Applicants

On 24 January 2017, the Supreme Court delivered their judgment – and they reaffirmed the decision of the High Court. The majority judgment of the Supreme Court went further by emphasising and stressing that there was a difference between "variations in domestic law resulting from changes in EU law, and variations in UK law resulting from withdrawal from the EU Treaties." As for the dissenting judgment, the three judges argued that whilst the Treaties are dependent upon incorporation to have effect at the domestic level, the reverse does not apply. The critique of the majority judgment will build and develop on the reasoning of the minority judgment.

Critique of the Supreme Court Judgment

Following the minority judgment, the ECA 1972 is not inherently dependent or condition on the validity of EU laws in the form of the UK's membership thereof but only as ever on its applicability of which is for Parliament and it alone to decide. It is the difference between cause and effect --- of which the former is dependent on the latter to take place or occur. As in case of the High Court judgment, the "direct link" between EU law and domestic law is not unmediated but mediated; likewise the effect of EU law on domestic law is not unconditional but conditional – that is on parliamentary sovereignty which therefore means the exercise of royal prerogative in on way disturbs or affects the legal rights mediated and channelled through the ECA 1972 as the foundational statute of EU law in the domestic plane.

This is entirely and wholly consistent with parliamentary sovereignty, particular in the first postulate of Dicey's namely that "Parliament can make or unmake any law"! Furthermore, this is being seen in the real world also in the form of the EU (Withdrawal) Bill 2018 – which at the time of writing has only passed its second reading[17] where the substance of EU will be transposed or converted into domestic law *qua* domestic law and comprises of two basic or major categories, namely EU-retained and EU-derived laws.

[17] For a fresh look at the inter-action and tension between supremacy of EU law and parliamentary sovereignty, see Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What has EU Membership Taught Us?' in Mark Elliott, Jack Williams and Alison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Oxford, Hart Publishing, 2018).
Source: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3142104>.

Furthermore, as implied and directly implicit in the minority judgment, the triggering of Article 50 should not regarded as the very act of withdrawing itself but merely represents the initiation or the first stage thereof. As an on-going process, the triggering of Article 50 only represents the beginning and therefore cannot and should not be conflated with the entirety of the withdrawal process. It can simply be pointed out that the triggering of Article 50 does not in and of itself cancels the UK's membership of the EU and by inclusion and extension the former's rights, privileges, duties, obligations and liabilities therein.

Therefore, since membership of the UK has yet to be revoked or rescinded, it is not accurate to assert that the rights of EU citizens of which the government is obligated to enforce and implement will have also been correspondingly revoked or rescinded. This is so as – on the international plane – the *existence* (in contradistinction from their applicability or efficacy) of the latter (*i.e.* rights, privileges, duties, obligations and liabilities) is dependent upon the *existence* of the former (*i.e.* continuing membership of the EU).

As such, a distinction needs to be drawn between the initiation and completion of the withdrawal process – which arguably was blurred or muddied in the judgment of both the High Court and Supreme Court. Or to put it slightly differently, on the one hand, it could be reasonably contended that the initiation of the withdrawal process will lead to an alteration or variation in domestic law. On the other hand, however, it is not clear and evident and certain that:

a) The alteration or variation will necessarily be concomitant, *i.e.* what takes place at the international level (*i.e.* no longer having the *force* of law) will be simultaneously accompanied by the same at the domestic level (*i.e.* no longer having the *force* of law) – in terms of the form ("formal status"). This is irrespective of whether the alteration or variation is in principle or practice.
b) The alteration or variation will of necessity mean the simultaneous removal of legal rights hitherto enshrined and guaranteed by the EU – in terms of the substance ("substantive status"). That is to say, the extent and scope of the contents of the EU law in the UK. Again, this is irrespective of whether the alteration or variation is in principle or practice.

To put it simply, it is a question of "timing." Does the triggering of Article 50 imply and presuppose that in the short period thereupon or in the short- to mid-term (*e.g*. within two years) the legal rights of EU citizens will be taken away or no longer in force? Even given the scenario of a "hard (*i.e*. no deal) Brexit,"[18] it is difficult to imagine that *Parliament* would not be involved in such a process. That is to say, it is simply inconceivable that the use of royal prerogative is meant to intrude upon parliamentary sovereignty (as a short-form) notwithstanding the government's "concession" in its arguments before the courts – given the current constitutional arrangements which have stood the test of time and is well politically well-established. And since the UK Constitution is intensely political in nature and where the political and legal are co-relates and co-efficients, it would be hard-pressed to conceive the government as actually overriding parliamentary sovereignty.

Conclusion

The issue of Brexit is wide and complex; and subject to various controversies in their own right. This short essay has sought to look into the judgments of both the High Court and Supreme Court concerning Brexit and therefore the issue from a constitutional and legal standpoint. It has attempted to analyse what are regarded to be some "shortcomings" in the judgment with as little prejudice as possible – without adopting a pro- or anti-Brexit position but only ever seeking to clarify the proper and actual and practical constitutional workings relating to the exercise of royal prerogative and its relationship to parliamentary sovereignty set within the context of what is a dualist Constitution. There is perhaps much more to be argued therein but it is hoped that by focussing on the core or major principles, the Constitution could be applied properly and conceptually adjusted to achieve the clarity that had eluded and evaded – according to the standpoint of this essay – the legal community.[19]

[18] For the legal and constitutional argument that "no deal" upon the expiry of the two-year negotiation period from the triggering of Article 50 is the default position, see Richard Aikens and Anna Bailey, "Fact-Checking the Dubious Withdrawal Agreement Arguments Being Put to MPs" (*Conservative Home*, 2018).
Source: <https://www.conservativehome.com/platform/2018/11/anna-bailey-and-sir-richard-aikens-fact-checking-the-dubious-withdrawal-agreement-arguments-being-put-to-mps.html>.

[19] This essay does not claim to be original but attempts as much as possible to develop the insights that have already been advanced and put forwarded by constitutional lawyers.