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Should judges aspire to be 'formalist' or 'naturalist' in their reasoning and decisions, and what are the implications of this debate for the upcoming Supreme Court judgement in Miller?

Introduction (approx 350 words)

Overview of the long-standing debate between the 'formalist' and 'realist' academic schools of thought, including Dworkin's theory of judicial reasoning as a compromise position incorporating both of these.

Introduce the Miller litigation (court judgement concerning the proper constitutional procedure for triggering Article 50 of the Treaty for the Functioning of the European Union.

Outline the relevance of this debate for the Supreme Court judges in the upcoming case of Miller.

Outline structure to be followed by essay:

Analysis of legal formalism, its major academic following, strengths/ weaknesses, and implications for the Miller litigation;

Analysis of legal realism, its major academic following, strengths/ weaknesses, and implications for the Miller litigation;

Analysis of how Dworkin proposes a formula which incorporates the strengths of each, and the implications of this for the Miller litigation;

Conclusion.

Legal Formalism (approx 700 words)

Outline the key features of the formalist school of thought:

Judges should determine cases by applying predetermined legal principles (the law);

The law should therefore provide a straightforward set of principles which are easy for lawyers to discover and judges to apply.

Overview prominent jurisprudential proponents of the theory (see sources).

Advantages of a formalist approach:

Ability to allow judges to evade political accountability for their decisions by claiming to have merely discovered and applied pre-existing legal rules;

Helps to ensure equality before the law, as like cases are more likely to be treated alike when the judge has less discretion;

Provides legal certainty;

Conducive to the rule of law, as individuals can discover their legal rights and obligations in advance and can make decisions in accordance with this. The rule of law itself offers valuable protection to human dignity.

Weaknesses of a formalist approach:

Cannot accommodate the requirements of justice in 'hard cases' which may not have been anticipated when the applicable legal rules were introduced.

Implications of adopting a formalist approach in Miller:

Judges will look solely at legal and historical scope of the prerogative of the executive;

The wording and interpretation of Article 50 TFEU, the Referendum Act and the European Community Act is likely to be a highly potent factor on this approach.

Legal Naturalism (approx 700 words)

Outline the key features of the realist school of thought:

This is the antithesis of the formalist school;

The law should seek to achieve a just outcome on the facts of any given case;

The rules may be applied where they achieve this outcome, but should be reinterpreted or adapted where they do not do so.

Overview prominent proponents of the naturalist school (see sources).

Advantages of the naturalist account:

Provides room for judicial discretion to ensure justice is served in 'hard cases'.

Disadvantages of the naturalist account:

Risk to the rule of law if judges are given discretion to stray from strict application of legal rules.

Implications of the naturalist approach for the Miller litigation:

Judges are likely to consider the normative arguments in favour of allowing the government to trigger Article 50;

The referendum result and the desire to give effect to the democratically determined will of the people is likely to be a highly potent factor in this reasoning.

Dworkin's Proposition (approx 700 words)

Dworkin proposes an alternative account of judicial reasoning which preserves the strengths of both the formalist and naturalist approaches.

Accepts that law should aspire to be rational and predictable system of principles

However also argues that this cannot be supreme, the requirements of justice must also be given due weight.

Outline the main elements of this account, which can be summarised as a three stage process of interpretation:

identification of the basic principles and norms relevant to the case at hand;

identification of the broad policy drivers and aims which the rules identified at the previous stage are intended to pursue;

identification of any reforms or adjustments which these rules require in order that the aims identified in the second stage may be better served.

Advantage of Dworkin's account:

Preserves the strengths of both naturalism and formalism to a large extent;

Minimises the risks presented to the interests of justice by legal naturalism;

Minimises the risks presented to the rule of law by legal naturalism.

Implications of Dworkin's account for the Miller litigation:

In addition to the historical and legal arguments regarding the powers of the government in relation to Article 50, judges may assess the underlying reasons for the allocation of powers to Parliament and the Executive;

This may lead to a more principled decision than either the naturalist or formalist approach in isolation, as all the factors can be weighed.

Conclusion (approx 500 words)

Both formalism and naturalism have their strengths, however neither offers a definitive solution for judicial reasoning.

Dworkin offers a balanced solution which preserves the best of both approaches whilst minimising the disadvantages of each.

This is illustrated by the implications for the case of Miller:

On a formalist approach, interpretation of Treaty and Statutory provisions may dominate judicial reasoning;

On a naturalist approach, policy arguments relating to the referendum result are likely to be most significant;

Adopting Dworkin's analysis, both the above factors can be taken into account and weighed against each other to reach a principled conclusion.

Suggested Sources:

Academic Literature

On the Formalist/Naturalist Debate

Dworkin, R, 'Taking Rights Seriously' (1977) University of Pittsburg Law Review 45.

Fuller, L, 'The Case of the Speculean Explorers', (1949) Harvard Law Review 62(1), 616.

Hart, HLA, The Concept of Law, (1964) 2nd Ed, Clarendon Law Series.

Holmes, O.W, The Common Law (1963) Boston: Little, Brown.

Posner, R. A, Frontiers of Legal Theory (2001) Cambridge, Mass: Harvard University Press.

Posner, R, Problems of Jurisprudence (1990) Cambridge, Mass: Harvard University Press. Stoner, J, Common Law and Liberal Theory (1992) Lawrence: Univ.

Press of Kansas. Patterson, D. M, Philosophy of Law and Legal Theory (2002) Malden, Mass.: Blackwell.

On the Miller Litigation

Barczentewicz, M, 'The Supreme Court Should Not Refer to the EU Court of Justice on Article 50', (2016) available online at

<https://ukconstitutionallaw.org/2016/11/11/mikolaj-barzentewicz-the-supreme-court-should-not-refer-to-the-eu-court-of-justice-on-article-50/>

<https://ukconstitutionallaw.org/2016/11/11/mikolaj-barzentewicz-the-supreme-court-should-not-refer-to-the-eu-court-of-justice-on-article-50/> .

Craig, P, and Freedland, M, 'Miller: Rights and Revocability' (2016), available online at: <http://ohrh.law.ox.ac.uk/miller-rights-and-revocability/>

<http://ohrh.law.ox.ac.uk/miller-rights-and-revocability/> .

Wilmot-Smith, F, 'Who Speaks for the State?' (2016), available online at: <http://www.lrb.co.uk/v38/n23/frederick-wilmot-smith/who-speaks-for-the-state>

<http://www.lrb.co.uk/v38/n23/frederick-wilmot-smith/who-speaks-for-the-state>.

Statute/Treaty Law:

European Communities Act 1972.

European Union Referendum Act 2015.

Treaty for the Functioning of the European Union.

Case Law Dudley v Stephens (1994) 14 QBD 273.

Miller v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin).

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