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BULLETIN

"WON'T YOU STAY ANOTHER DAY?":

Supreme Court hands MPs vote to start Brexit process

R (MILLER) V SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

Gordon Nardell QC and Tom Leary examine the Supreme Court's judgment in *Miller* [2017] UKSC 5 and ask where it leaves the Crown's prerogative power to conduct foreign affairs

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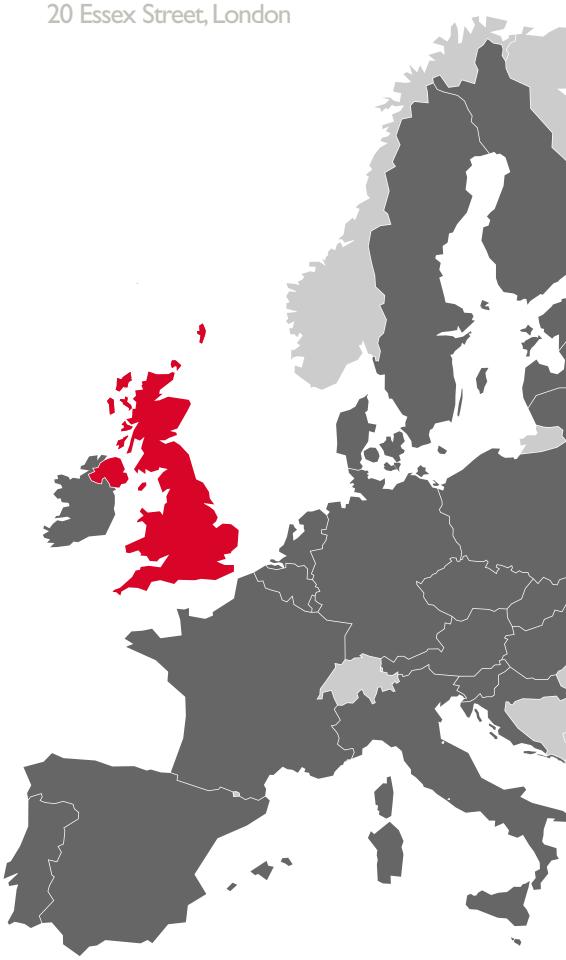
Forget the experts. With William Hill offering odds of 5/2 (a 28% chance) on the Government winning its leapfrog appeal, the smart money was always on the Supreme Court upholding the Divisional Court's conclusion that fresh Parliamentary legislation would be needed to authorise notification of withdrawal from the EU under Article 50 TEU. And by an 8-3 majority, the Court's 11 members – sitting en *banc* for the first time in its 7-year existence – proved the bookies right.

The Divisional Court decided, in short, that as regards termination of the UK's membership of the EU, the usual prerogative power of the Crown to conduct foreign affairs was displaced by the legislative regime under the European Communities Act 1972 (ECA).[1] That issue remained central to the appeal. But meanwhile the field had grown rather crowded. Also before the Supreme Court were a series of devolution issues resulting from the *Agnew* and *McCord* references and interventions by the Scottish and Welsh Ministers, raising the question whether triggering Article 50 required the consent not only of Westminster but also the devolved legislatures.

By a majority the court dismissed the UK Government's arguments on the central ECA question but ruled unanimously in its favour on the devolution issues. Even a unanimous 5-judge court following the traditional English practice of separate judgments can make it hard to discern precisely what law its decision lays down. With an 11-judge bench deciding a case of this constitutional weight, that could pose huge difficulties. The *Miller* majority deftly avoided this pitfall through the herculean feat of producing a single joint judgment (an achievement not matched by the three minority members).



Westminster v. Whitehall: does the prerogative survive the ECA regime?

The Divisional Court – no doubt anticipating political fall-out from its decision – was at pains to frame this issue in terms of application of well-established legal principles and orthodox statutory construction. The Supreme Court approached the issue in much broader constitutional terms. It is impossible for a short article to do justice to the nuanced complexity of the decision. So we analyse it mainly from the standpoint of its implications for the future legal relationship between Parliament, government and the courts in relation to the conduct of foreign affairs, not just in the admittedly important context of UK withdrawal from the EU, but beyond. References [x] are to paragraphs of the Supreme Court's judgment.

A justiciable issue

As in the Divisional Court, the Government accepted that the claim was justiciable. Giving notice under Article 50 is an act of the Crown on the international plane. The general rule is that no domestic court is competent to pronounce on matters of pure international law, and the prerogative power *"to make and unmake treaties" is "not reviewable"* by the courts [54], [55]. But as the majority pointed out, *Miller* was concerned not with international law but with ministers' ability *"to bring about changes in domestic law by exercising their powers at the international level"* [5]. The domestic implications of notification under Article 50 lay at the heart of the issues.

The prerogative

The prerogative is a `residual' source of Crown authority. Several centuries of UK constitutional history have led to the position where the prerogative cannot alter either statute or common law. Thus Ministers *"cannot frustrate the purpose of a statute" by "emptying it of content or preventing its effectual operation", eg. Laker Airways Ltd. v. Department of Trade*[2] [51]. Conversely, statute may displace a former prerogative power either by its express terms or, more usually, by necessary implication, where Parliament legislates to `occupy the field' previously regulated by the prerogative: *Attorney General v. De Keyser's Royal Hotel Ltd*[3] (memorable from the Supreme Court hearing for prompting a slightly surreal exchange about pronunciation which found its way, still more surreally, onto a t-shirt) [48]. Ministers cannot then deploy the prerogative to `pre-empt' a decision by Parliament to repeal the legislation: *R v Secretary of State for the Home Department, Ex p Fire Brigades Union*[4] [51].

Consequently the prerogative is of limited scope in domestic affairs. But it remains a key source of authority for the Crown's conduct of foreign affairs. Under the UK's dualist system, a treaty made in exercise of the prerogative cannot give rise to domestic rights and obligations unless incorporated into law by Parliament. It is precisely the *lack* of domestic effect of international law that gives the wide prerogative power to conduct foreign relations its legitimacy and makes it compatible with Parliamentary sovereignty. Conversely, it was precisely the lack of prerogative power to change domestic law that gave rise to the problem in this case. Hence the focus of the dispute on the regime established by the ECA for giving domestic effect to Community, now EU, law.

ECA: the Government's case

The Secretary of State argued that the prerogative power to give notice under Article 50 *could* be displaced by the ECA if its provisions produced that result "expressly or by necessary implication". However, the ECA was a mere "conduit pipe" for whatever the content of EU law happened to be at any given time. By providing Parliamentary authority for the domestic effect of EU law, it treated that law as akin to delegated legislation. Changes to the Treaties over time, and even the day-to-day operation of the EU legislative process in which UK ministers participate through the Council – all pursuant to the prerogative – meant that the body of law given domestic effect through the ECA was constantly changing. Notice under Article 50 was fundamentally no different. It would be a prerogative act altering the body of law on which the ECA bites, albeit by reducing it to nothing, but leaving the ECA itself intact. The consequential change in the domestic regime would remain a matter for Parliament through the proposed Great Repeal Bill. So nothing in the ECA displaced, expressly or impliedly, the prerogative power to withdraw from the Union.

The majority's conclusions

The majority rejected those propositions. The ECA was a *constitutional* statute. It did not itself determine the content of domestic rights and obligations derived from EU law, but instead defined as a source of UK law the body of law emanating from the EU order. Such a rule is *par excellence constitutional in nature: "One of the most fundamental functions of the constitution of any state is to identify the sources of its law"* [80]. The ECA *"operates as a partial transfer of law-making powers, or an assignment of legislative competences"*

and could not be equated to a statute delegating legislative power to a minister [68]. There was a *"vital difference"*, of kind and not just degree, between varying the precise content of EU rights and obligations on which the ECA operates, and reducing the category to zero by withdrawal. The latter *"involves a unilateral action… which effects a fundamental change in the constitutional arrangements"* of the UK [78]. The need for a Great Repeal Bill to provide renewed authority for rights and obligations flowing from EU law if anything emphasised the qualitative nature of the change necessitated by withdrawal from the Union [70], [94].

Against that background, the Secretary of State's approach to the statute v. prerogative question turned the true position on its head. The correct question was not whether the ECA contained a sufficiently clear indication, expressly or impliedly, that the prerogative power to initiate withdrawal was *displaced*; but rather whether the Act *"positively created such a power"* despite the destructive impact its exercise would have on a domestic rule of constitutional law [86]. In posing that question, the majority likened the position to the `principle of legality' under which legislation is not to be taken to abrogate fundamental rights unless it does so expressly or by necessary implication. As explained in *R v. Secretary of State for the Home Department ex p. Simms*[5], *"clear words"* are needed to override such rights because *"Parliament must squarely confront what it is doing and accept the political cost"* [87]. At all events, the majority answered the question with a clear "no":

> *"On the contrary, we consider that, by the 1972 Act, Parliament endorsed and gave effect to the United Kingdom's membership of what is now the European Union under the EU Treaties in a way which is inconsistent with the future exercise by ministers of any prerogative power to withdraw from such Treaties"* [77].

In reaching that conclusion, the majority was careful to distinguish the illegitimate use of prerogative powers to *change* domestic law from their legitimate use albeit with domestic *consequences*. First, the impact on legal rights or duties may be *"inherent in the prerogative power"*: for example, the power to destroy property in wartime in the interests of national defence, though subject to payment of compensation *(Burmah Oil Co (Burma Trading Ltd) v. Lord Advocate* [1965] AC 75) [52]. Second, the exercise of power *"may change the facts to which the law applies"*, for example where war is declared so that some people become enemy aliens. That does not change the law, but *"merely the extent of its application"* [53].

Finally, the majority examined the post-1972 legislative framework, including the European Union Referendum Act 2015, but found nothing to cast doubt on the ECA position. Parliament could have, but did not provide for a change in the law in consequence of the outcome. *"Unless and until acted on by Parliament"*, the force of the referendum result was *"political rather than legal"* [121], [124].

The minority view

The minority was led by Lord Reed. Lords Carnwath and Hughes agreed, each adding remarks of their own. None disagreed fundamentally with the majority's analysis of the underlying legal principles, accepting that the key question was whether the ECA regime either displaced or preserved the prerogative power to terminate the UK's membership of the EU. But in contrast with the majority, Lord Reed thought the Crown's prerogative in foreign affairs was *"so fundamental"* that the question must be approached – as the Secretary of State urged – from the orthodox standpoint whether the ECA contained provision expressly or by necessary implication curtailing the power [159], [194].

Lord Reed made a careful textual analysis of the ECA, emphasising that section 2(1) gave direct effect in UK law only to those rights, obligations, remedies and procedures, etc. *"from time to time"* arising under the Treaties, and *"as in accordance with the Treaties are… to be given effect… in the United Kingdom"*. That indicated that Parliament had intended the operation of the ECA to be contingent: the Act would make EU law a source of domestic rights etc. only for so long as the Treaties applied to the UK and so required EU rules *"to be given effect"* in the internal legal order. Parliament had thus anticipated the contingency of ministers exercising the prerogative power to withdraw from the Union [197].

The position was reinforced by the European Union (Amendment) Act 2008, which added the Lisbon Treaty to the list of instruments that the ECA defines as "The Treaties". Lisbon introduced the Article 50 right of a State to withdraw from the EU. Lord Reed stated:

> *"If Parliament chooses to give domestic effect to a treaty containing a power of termination, it does not follow that Parliament must have stripped the*

Crown of its authority to exercise that power. …the impact of the exercise of the power on EU rights given effect in domestic law is accommodated by the 1972 Act: the rights simply cease to be rights to which section 2(1) applies. Withdrawal under article 50 alters the application of the 1972 Act, but is not inconsistent with it." [204]

Lord Carnwath was concerned about the implications of the majority's approach for the broader constitutional balance between legislative, executive and judicial power. Citing Lord Mustill's (dissenting) speech in the *FBU* case, Lord Carnwath cautioned the courts to ensure that their reviewing role complimented rather than clashed with Parliament's political role in holding ministers to account [252]. He observed that the Commons had passed *"by a large majority"* a resolution which included recognition of *"Parliament's responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union"* and which approved the Government's intended timetable for triggering Article 50 (by the end of March 2017). The majority noted at [123] that the Secretary of State had *"rightly accepted that the resolution… cannot affect the legal issues before this court"*. However, Lord Carnwath considered that the resolution:

"…lends support to the view that, at least at this initial stage of service of a notice under article 50(2), the formality of a Bill is unnecessary to enable Parliament to fulfil its ordinary responsibility for scrutinising the government's conduct of the process of withdrawal" [255].

Parliament's non-legislative scrutiny function also appears to have informed Lord Carnwath's rejection of the argument that ministerial initiation of Article 50 would pre-empt Parliament's legislative role in deciding whether to amend or repeal the ECA:

"It is one thing, as in the FBU case, to use the prerogative to introduce a scheme which is directly contrary to an extant Act. It is quite another to use it to give effect to a decision the manner of which has been determined by Parliament itself, and in the implementation of which Parliament will play a central role." [267]

Article 50 and the devolution settlements

The devolution questions were formulated in various ways, but fundamentally they raised two issues. First, the devolution statutes incorporate EU law through limiting devolved competence by reference to compatibility of the institutions' actions with EU rules. Does that mean that, to trigger Article 50, fresh UK legislation would be needed to amend the devolution legislation as well as the ECA? That question segues into the second: does the `Sewel Convention' – that the consent of the devolved legislatures will be sought before Westminster legislates on devolved matters or alters devolved competence – disable the UK Parliament from passing the legislation necessary to trigger Article 50 without agreement in Belfast, Edinburgh and Cardiff?

Given the majority's answer to the question whether the prerogative survived the ECA regime, the court acknowledged that it was not strictly necessary to determine the first of these questions. It did, though, provide an answer – this time, one supported by all 11 justices.

First, in enacting EU law constraints in devolution legislation, Parliament had clearly proceeded on the assumption that the UK would remain a member of the EU. But there was a difference between an *assumption* and a *requirement* to remain: *"in imposing EU constraints and empowering the devolved institutions to observe and implement EU law, the devolution legislation did not go further and require the United Kingdom to remain a member of the European Union"* [129]. This was because, as the Supreme Court has consistently maintained, *"the devolved legislatures do not have parallel legislative competence in relation to withdrawal from the European Union"* with the UK Parliament. However, *"it would… be incongruous if constraints imposed on the legislative competence of the devolved administrations by specific statutory provisions were to be removed, thereby enlarging that competence, other than by statute"* [132]. So it seems that the court would, if necessary, have decided that the limitations placed on the devolved administrations could not be removed without legislative action by the UK Parliament.

In adopting this approach, the court can be seen as reaffirming that any alterations to the devolved competencies are the domain of the UK Parliament, whose role is not to be assumed by either the UK government **or** the devolved administrations.

In relation to the Sewel Convention, the Supreme Court maintained the long-established orthodoxy that *"the courts of law cannot enforce a political convention"* [141]. Critically, in such a politically sensitive case, the court drew a clear line between pure legal questions, which it was required to determine, and matters

of pure politics, upon which it would refuse to give definitive guidance. As the majority concluded, *"judges therefore are neither the parents nor the guardians of political conventions"* [146]. The statutory recognition of the Sewel Convention, in s. 2 of the Scotland Act 2016, s. 2(8), did not convert it from a convention into a justiciable rule of law. So the degree to which the Sewel Convention requires consultation with Belfast, Edinburgh and Cardiff remains a political question for the UK government (and the devolved administrations) to answer.

In reaching these conclusions on the devolution issues, the court maintained both a healthy constitutional dialogue – by indicating that the UK Parliament was to have the final word on changes to the devolved competencies – and judicial restraint, in recognising that the court could not determine every question of constitutional importance, there being a field of political constitutional dialogue in which its contribution should be limited.

Where does it leave us?

The immediate consequence of the Supreme Court's decision was the introduction in the Commons of a two-clause Government Bill designed to provide the legislative authority to trigger Article 50 which was lacking from the prerogative. But what of the wider implications?

A UK Constitutional Court?

First, it is worth reflecting on what *Miller* tells us about the Supreme Court itself. In the absence of a formal UK constitutional court, it falls to the Supreme Court – which, apart from its specific devolution functions, operates as a general-purpose court of final appeal – to declare the content of UK constitutional law. *Miller* reflects a court whose constitutional jurisdiction has come of age: not simply because of the nature of the issues in the case, but because the majority judgment demonstrates how the senior judiciary has gradually assembled, from disparate strands of public law, what can now be regarded as a distinctive and coherent doctrine of constitutional adjudication. A good example is the way the majority addressed the `constitutional' nature of the ECA. The Act enjoyed that status not because of some abstract notion of political importance, but because of its function as a constitutional rule. The `principle of legality', developed as a rule of interpretation to protect fundamental rights, can now be seen as part of a more generalised constitutional principle under which Parliament's power to encroach (or more precisely, to enable the executive to encroach) on a range of interests judged of peculiar importance is constrained by the requirement to use `clear words', and so `squarely confront' the political consequences.

Foreign affairs and the courts: Brexit and beyond

Second, the courts have in recent years shown a great deal of interest in examining the basis and scope of the Crown's power to act on the international plane. There is a growing sense of a trend towards a more searching role for the courts in reviewing the exercise of that power. Shortly before its Miller judgment the Supreme Court decided *Belhaj*[6], making a modest but discernible adjustment of the rules on immunity and the availability of the Act of State defence, enabling the court to question the legality of conduct of the executive towards foreign nationals in the context of inter-state relations. *Miller* represents a further enlargement of the court's role in scrutinising the legality of activities once squarely within the non-justiciable province of the executive: it is unlikely that Lord Carnwath would otherwise have sounded his warning.

The majority variously described the ECA as "unique" and "unprecedented", but it must follow from the judgment that the question whether statute has curtailed the prerogative may be approached in a similar way in other areas where an international act entails a change in rights and obligations governed on the domestic plane by statute. One example has already appeared in discussions on social media. The Human Rights Act 1998 is undoubtedly a `constitutional' statute. Though improbable, any attempt by government to negate its effects by purporting to withdraw from the ECHR without first persuading Parliament to legislate seems likely to meet a similar fate to its Article 50 intentions. Perhaps less improbably, the courts may in future be invited to consider the implications of some of the international trade agreements likely to follow Brexit. Certain of these might well purport to confer on overseas investors enforceable rights (albeit at the international level) to require the UK government to bring about a state of affairs not currently contemplated by the statutory regimes governing, say, the provision of health, education, social care and transport services.

The battleground in future litigation in this area is likely to be whether, as in *Miller*, the use of the prerogative genuinely entails an unauthorised change in domestic law, or whether

it falls instead within the `inherent power' or `change of facts' categories recognised at paragraphs [52] and [53] of the judgment – categories which may themselves require future refinement.

Constitutional dialogue

Finally, *Miller* is a reminder that constitutional dialogue is alive and well in the UK. The court can, and will, determine the proper scope of the prerogative power and require the executive to consult and convince Parliament of its view where necessary. However, the court will be slow to trespass on political constitutional dialogues, and is prepared to approach those aspects of our constitution with restraint – leaving the executive to determine, for example, the level of consultation or dialogue which might be expected or required by the Sewel Convention.

KEY TAKEAWAYS

- The Supreme Court held that the ECA enacted a `constitutional' rule defining EU law a source of UK law. Ministers' triggering of the Article 50 withdrawal process would empty that rule of all content. Such a fundamental change to domestic law by means of the prerogative would require explicit legislative authority, and nothing in the ECA conferred that authority. Fresh primary legislation would be needed to authorise ministers to trigger withdrawal.
- The `principle of legality' – requiring Parliament to use sufficiently clear legislative language if it wishes to encroach on constitutionally important interests, and to `squarely confront' what it is doing – now forms part of a distinctive and coherent doctrine of constitutional adjudication developed by the Supreme Court.
- The majority judgment has, to some extent, redrawn the boundaries of both the Crown's prerogative power to act on the international plane and the court's power to review its exercise. That is consistent with the trend in other recent cases, such as *Belhaj*, on the scope of judicial examination of ministerial acts in the conduct of foreign affairs, once within the non-reviewable exclusive province of the executive. It has implications for future debates on the ECHR and other international agreements with domestic implications, including post-Brexit trade and investment deals.
- But the court unanimously rejected the proposition that the use of prerogative power to trigger Article 50 would, by removing the EU restriction on the competence of the devolved institutions, be incompatible with the devolution statutes; and it maintained the orthodox position that the Sewel Convention, like other constitutional conventions, is not justiciable in the courts.
- The judgment is a reminder that constitutional dialogue is alive and well in the UK.

1 *Tom Leary's briefing on the Divisional Court decision can be found here.*
2 *[1977] QB 64, CA.*
3 *[1920] AC 508, HL.*
4 *[1995] 2 AC 513, HL.*
5 *[2000] 2 AC 115, HL.*
6 *Belhaj and another v. Straw and others; Rahmatullah (No 1) v Ministry of Defence and another* [2017] UKSC 3.

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Gordon deals with complex disputes under EU and international law, including in the energy sector and other regulated markets. He handles contract, tort and investment claims by and against state bodies, appearing in a wide range of judicial and arbitration proceedings in Europe and Asia and is currently advising on several Brexit-related matters. Gordon has also appeared in a number of leading cases on UK constitutional issues including R. (Jackson) v. Attorney General [2005] UKHL 56. He is a Fellow of the Chartered Institute of Arbitrators and a CEDR accredited mediator. Gordon previously served in the Legal Affairs Directorate of the Council of Europe and the UK Parliamentary Counsel Office. He chaired the Bar Council EU Law Committee 2015-16.

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Tom has a broad practice in commercial and public law. He regularly acts for clients in claims involving public officials and states, including representing a company in US$200m+ claim against a Caribbean state for breach of a development agreement, advising on the potential illegality of major bank loans (amounting to US$1.8b+) to state-backed African companies, and advising on judicial review remedies. Tom recently returned to Chambers after spending a year as the Judicial Assistant to Lord Mance in the Supreme Court.

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