



HIGHLIGHT

REPRESENTING THE PEOPLE VS CHANNELLING THEM: CONSTITUTIONAL NICETIES IN AN AGE OF INSTANT DEMOCRATIC GRATIFICATION

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On 3 November 2016 the High Court decided in the case *R (Miller) v. Secretary of State for Exiting the European Union*¹ that the Prime Minister of the United Kingdom lacks the power to trigger the departure of the United Kingdom from the European Union by serving notice of this intention pursuant to Article 50 TEU without first obtaining consent from Parliament. The government of the UK had argued that the Prime Minister could do so using so called 'prerogative' powers.

These prerogative powers are a residue of the former rights, privileges and powers of the monarch. Once extensive, they are now severely limited, and are no longer exercised by the monarch personally but by the Prime Minister, nominally on her behalf, but of course in fact as part of her political function.

It is conventional that the prerogative powers do extend to the making and unmaking of treaties with other states, but do not extend to the making of laws with domestic force. This distinction is possible because the UK is a dualist state, in which Treaties have no domestic legal force unless Parliament chooses to give them this.

The government therefore argued that withdrawing from the EU Treaties was a conventional exercise of the prerogative. However, the court noted that EU law had been given domestic force by the European Communities Act 1972, which required all EU law to be given effect domestically. This act, it found, would be deprived of its effectiveness if the UK withdrew from the EU. That would amount to changing the law in

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¹ UK High Court, *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) vs. The Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), www.judiciary.gov.uk.

force domestically, which could not be done without Parliament's consent. Just as only Parliament could make the ECA, only Parliament could unmake it.

The essence of the judgment is therefore in the idea that withdrawal changes the law in force in the UK. That argument might have been made in various ways. It might have been argued that many provisions of EU law, by their very nature, have direct applicability and direct effect in the Member States, and do not require national implementing acts. The Court of Justice of the EU has expressed views to this effect in the past, and indeed maintains them today. This perspective would certainly support the view that withdrawal changes the law domestically in force.

However, the High Court did not follow this path. Instead it relied on the consequence of withdrawal for the ECA. This is a rather more difficult case to make. For much EU law, such as directives, and some judgments of the Court, are in fact translated into national laws, and those laws will continue to have domestic force after withdrawal unless Parliament chooses to repeal them. However, as the High Court noted, withdrawal will mean that at the very least the capacity to send a reference to the Court of Justice and to vote for the European Parliament is lost, and both these matters are rights embodied in EU law and imported into the UK via the ECA. To this extent, the ECA is deprived of effect. Therefore, it concluded, withdrawal from the EU changes domestic law and cannot be done using the prerogative.

There are some problems with this argument. The ECA does not refer to particular provisions of EU law, but rather imports the whole package. It provides that all the obligations which the UK accepts as a Member State be given domestic effect, to the extent that EU law itself requires this.

Strictly speaking, one could argue that withdrawal therefore has no effect on the ECA. It is the EU law which is applicable to the UK that changes. The ECA continues to give domestic effect to all the UK's EU legal obligations, but it those obligations have been reduced to zero. There is no change to domestic law, but simply to the scope of EU law.

This is the problem with taking the ECA approach, rather than recognising the direct applicability of EU law and its status as domestic law of a particular sort.

The High Court perhaps hinted at some recognition of this, by phrasing much of its discussion in terms of rights. While the more traditional constitutional position is that prerogative powers cannot be used to make laws, the Court reformulated this a little to suggest that prerogative powers cannot be used to change the rights enjoyed by people in the UK. Rights are generally alien to UK law, which has preferred to think in terms of duties, but the rephrasing helps the argument – for it is unequivocally the case that withdrawal does change the rights enjoyed by residents of the UK. It also allowed the court to include free movement rights enjoyed by British citizens abroad. While not obviously domestic law, they are certainly rights enjoyed by British citizens that withdrawal would take away. However, while the rights language works well for the argument, it is a

legal sleight of hand that is not without wider consequences, for the notion of rights is somewhat wider and more slippery than the notion of laws. The prerogative is narrowed a little, it would seem.

In any case, whichever path is chosen – and one should remember that in December the appeal will be heard, and even if the Supreme Court confirms this result it will undoubtedly supply its own reasoning, which will then become the point of reference – the result reached must be the right one. The prerogative is a historical residue, and it was the civil war in the 1600s which definitively established that the monarch is subordinate to Parliament, and that Parliament is the only law-making power in the land, albeit that the High Court found support for this idea in even older judgments. The underlying constitutional principle is unequivocally that the people should not be subject to the whims and preferences of the monarch, but should know that only Parliament could regulate their affairs. The powers left to the monarch after the civil war were precisely those which did not immediately change the domestic legal status quo. Given this, if the High Court did not wish to reverse the result of the civil war – and that would have been a large step for a court of first instance – it had little choice but to insist that only Parliament had the power to take the UK out of the EU.

In general, of course, Brexiteers have been supportive of the idea that the United Kingdom Parliament is the sovereign, supreme and exclusive law-making power in the land. They have also been supportive of the idea of national democracy. However, in this particular context they made an exception from their principles, fearing that Parliament would attempt to hinder the process of Brexit. Democratic institutions must not, of course, be empowered to an extent that they might subvert the will of the people. Implicitly the Brexiteers seemed to have a vision of the referendum as in some sense self-executing, a constitutional novelty spiritually at odds with their generally nostalgic bent. However that may be, the judgment was received with notable anger and even hysteria by those national newspapers whose aim is traditionally less to inform than to stimulate – that is to say most of them.

Their fears are unlikely to be realised. The Prime Minister may now have to go to Parliament for permission to begin the Article 50 process but she is likely to get it. While most Members of Parliament support membership of the EU, a majority have indicated that they will not act according to their beliefs now that it has turned out that most people disagree with them. This is a remarkable position, which if carried to its conclusion would cause every losing party to align its views with the winning one. However, MPs want re-election, and are aware that if they do not tailor their views to the 51% they will probably not get it, particularly since the constituency parties who choose their candidates are typically even more rabidly anti-EU than the average, at least in the case of the Conservative party, which currently dominates Parliament.

Nevertheless, Parliament might perhaps be able to impose conditions on its support for Brexit. Substantive ones – a soft Brexit? Membership of the internal market? –

would be difficult to impose unilaterally because whether they are achievable depends as much on the EU as on the UK. However, they might perhaps impose procedural constraints, requiring the Prime Minister to inform them of standpoints taken, to seek approval for proposals made in the negotiation, and so on. The hope or fear is that Parliament might manage to seize control of the process and twist a harder Brexit into a softer one.

This seems very unlikely. Firstly, it is difficult to really supervise a negotiation. Parliament can insist that the Prime Minister take certain standpoints, but if the EU refuses to agree to them, then one arrives at an impasse, and if no agreement is reached then there is the risk of the Article 50 two year term running out and leaving the UK out in the cold, in the hardest Brexit of all. The degree of involvement in the negotiating process that Parliament would have to have in order to steer it is considerable, and one wonders whether it is institutionally feasible.

As well as this, Article 50 may be beside the point. It is increasingly accepted that Article 50 will be used to unravel the existing EU-UK relationship, but the new relationship will be adopted using a different process and legal base. Article 50 is primarily then about pension rights, and splitting up the real property, and unwinding long-term joint projects, and all the messy divorce stuff. While important, this is not the main issue at stake. Public debate, by contrast, is about the shape of the new EU-UK relationship. The more important question is whether the Treaty eventually embodying this can be adopted using the prerogative. The answer, on the basis of this judgment, would seem to be that it depends whether it changes domestic law. In general treaties do not. One might argue that if a treaty requires domestic legal changes, that exceeds the prerogative, but this is going a step further than the current judgment, which addresses a treaty change which does not just require, but actually causes, changes in domestic law. Parliament may therefore get some weak say in how the EU and the UK untangle their past, but this is quite different from getting a say in how they redefine their future.

A minor point of the case is that both parties agreed that once served, an Article 50 notice could not be withdrawn: the process was irrevocable. That is of enormous importance, for otherwise the notice itself does not necessarily lead to exit, and the basis of the judgment is undermined, or at least changed. On the whole, it seems likely that the court's view is correct: if an Article 50 notice could be withdrawn this would fundamentally change the dynamics of the negotiation, to the enormous advantage of the withdrawing state. Nevertheless, the point is not beyond argument, and the contrary view has been put forward seriously. It will be interesting to see whether the Supreme Court is equally nonchalant on what is arguably a crucial question.

Parliament can of course bring a government down. Theoretically it already has the power to dominate the executive. However, institutional and political factors mean that in practice it follows, rather than leads. This judgment may give it a gentle push towards

the centre stage, but whether it manages to sing a song that steals the show remains to be seen.

Ultimately the judgment may enter the textbooks primarily as a robust assertion of the sovereignty of Parliament, and even of the exclusive right of the people of the UK to make their own laws. Any future treaty or integration arrangement whereby amendments to domestic law are envisaged, or where domestically applicable rights are created, will take place in the shadow of these principles, whose precise scope is still unclear. Where the UK signs investment treaties involving tribunals to which UK investors may appeal, does this also mean that rights are created, so that the treaties or their ending require Parliamentary consent? The case law on this topic may have quite some way to go.

