



## OVERVIEWS

### REPRESENTING THE PEOPLE VS CHANNELLING THEM: CONSTITUTIONAL NICETIES IN AN AGE OF INSTANT DEMOCRATIC GRATIFICATION. EPISODE 2: THE SUPREME COURT

TABLE OF CONTENTS: I. The Brexit Judgment. – II. The role of Parliament in Brexit. – III. Conclusion.

I. On 24 January 2017, the Supreme Court decided in the case *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, by eight votes to three, that the Prime Minister of the United Kingdom lacks the power to trigger the departure of the United Kingdom from the EU by serving notice of this intention pursuant to Art. 50 TEU (hereinafter, Art. 50) without first obtaining consent from Parliament.<sup>1</sup> In doing so it confirmed the earlier judgment of the High Court, using essentially the same reasoning.<sup>2</sup> 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 – or repealing - 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 Supreme Court, following the High Court, took a different view. It noted that in adopting the European Communities Act in 1972 (ECA), Parliament had introduced a new source of law into the UK, namely directly effective Treaty articles and legislation, and judgments of the Court of Justice. Withdrawal would end the ability of individuals in the UK to rely on such sources of law

<sup>1</sup> UK Supreme Court, judgment of 24 January 2017, *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, [2017] UKSC 5, [www.supremecourt.uk](http://www.supremecourt.uk).

<sup>2</sup> UK High Court, judgment of 3 November 2016, *The Queen (on the application of Gina Miller and Deir Tozetti Dos Santos) v. The Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), [www.judiciary.gov.uk](http://www.judiciary.gov.uk).

and rights, and so amount to domestic law making. Certainly, many EU rights were enacted in domestic statutes and so would remain part of UK law unless Parliament chose to repeal them, but many others were not, and the fact of removing a source of law – the EU institutions – was itself an important change to the domestic legal situation. Therefore, serving an Art. 50 notice, because it would inevitably lead to such a result, could only be done if Parliament adopted an act empowering this. To put it bluntly, one may say that since Parliament chose to make EU law part of UK law, only Parliament can take it out of UK law – which would be the effect of withdrawal.

The result must be the correct one. The prerogative is a historical residue, a remnant of royal authority left over after 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. 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 could not be used to make domestic law. Given this, if the Supreme Court did not wish to reverse the result of the civil war it had little choice but to insist that only Parliament had the power to take the UK out of the EU.

Nevertheless, the dissenters argued the contrary, based on a textually defensible but constitutionally unambitious approach to the law. Lord Reed, who wrote the major dissenting judgment, pointed out that the ECA gave domestic enforceability to all the law applicable to the UK by virtue of the Treaties. He suggested that the purpose of this was to ensure that the domestic legal situation matched the international legal situation, to avoid conflicts. Changing the international legal obligations of the UK by withdrawing from the EU was not therefore contrary to the ECA, which itself was neutral as to what those obligations might be. Lord Reed did not consider that withdrawal would amount to changing “the law of the land” because the relevant law of the land was the ECA, which would be untouched. It would merely be the case that the body of EU law upon which the ECA draws would be changed. Changing EU law, on this view, is not changing domestic law.

The argument is a brave act of rearguard monarchism, but takes a rather formal approach to what was a distinctly substantive civil war. Whatever academic arguments may be possible about whether EU law “is” domestic law, the majority are clearly right that withdrawal would change the enforceable legal rights available to individuals in the UK, and that is precisely what the Queen or her ministers are not supposed to be able to do without Parliamentary consent.

There are a few other points worthy of note. Both the majority and minority judgments rejected the idea that EU law takes effect domestically as a result of its special

nature, a view which can certainly be read into e.g. *Costa v. ENEL*<sup>3</sup> or *van Gend en Loos*.<sup>4</sup> It takes effect, they said, because Parliament says it does.

Yet despite this rebuttal of the Court of Justice's more mystical approach to legal integration, there was also a reliance upon it. For the idea that withdrawing from the EU changes domestic legal rights relies on the idea of direct effect. Without this, all of EU law is just instructions to governments, and each bit of EU law must be separately implemented if it is to grant or limit individual rights. Then the EU would be no different from other international organisations where agreements are made which require domestic implementation to make them effective.

Direct effect is not in the Treaties, but one of the Court's many creations, and a rather contested one. It has been, when paired with supremacy, key to the success and power of the EU, and in a sense key to Brexit – that intrusive legal power, wielded in part by the Court of Justice, has long been a *bête noire* of British Eurosceptics. It is in one sense appropriate that the final fling of this doctrine in the UK should be to cast a very small spanner into the works of the Brexit process. Yet it is probably better seen as a delicious irony that it took the doctrine of direct effect to rescue Parliamentary sovereignty from the hands of populism.

An additional aspect of the judgment was its discussion of the role of the UK regions. They had argued that withdrawal would affect the legal position of devolved parliaments in Northern Ireland, Wales and Scotland, and that they therefore had some legal right to be consulted before an Art. 50 notice was served. The Supreme Court rejected this. Certainly, the lives and functions of regional governments would change without EU law. However, the relationship between the UK and the EU was not among the powers that had been devolved to them. It was a matter for the UK government and, now, the UK Parliament. Whatever voice they might have in Brexit was a matter for politics, not law.

This part of the judgment does not seem legally controversial. Indeed, the regions almost certainly argued out of a sense of obligation rather than genuine hope. What the judgment does for them is lay the basis for an argument that if they are not listened to, their only resort will be to move for independence. We can expect to hear much more along these lines in the coming months.

II. 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

<sup>3</sup> Court of Justice, judgment of 15 July 1964, case 6-64, *Costa v. E.N.E.L.*

<sup>4</sup> Court of Justice, judgment of 5 February 1963, case 26-62, *Van Gend en Loos v. Administratie der Belastingen.*

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 initial High Court 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 will now have to go to Parliament for permission to begin the Art. 50 process but she is likely to get it. While most Members of Parliament (MPs) 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 per cent 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 Art. 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, Art. 50 may be beside the point. It is increasingly accepted that Art. 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. Art. 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, and the tone of the government is very much that they will not be venturing into any organisations with

such penetrating legal doctrines again – British laws will be made in Westminster, can now often be heard. It seems therefore that a future UK-EU trade agreement could be adopted using the prerogative. While Parliament may get some weak say in how the EU and the UK untangle their past, the judgment does not require it to be involved in how they redefine their future.

A minor point of the case is that both parties agreed that once served, an Art. 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 Art. 50 notice could be withdrawn this would fundamentally change the dynamics of the negotiation, to the enormous advantage of the withdrawing state, and enabling uncertainty about a state's membership to be dragged on for years, contrary to the clear intention of Art. 50 that matters be wrapped up within the two year deadline. Nevertheless, the point is not beyond argument, and the contrary view has been put forward seriously. The reason why the point was not debated, in either the High Court or Supreme Court, is not because the parties genuinely thought it quite clear but precisely because they did not. That fact would mean that as a question of interpretation of the Treaties it would be sensible, and for the Supreme Court obligatory, to refer it to the Court of Justice.

That would have created a delay which would have frustrated the government's desired Brexit timeline. More to the point, the mere idea that the Court of Justice might have an important say in the domestic law and politics of Brexit would have created a political backlash that no-one in the court was prepared to contemplate. Hence both judgments, while clear in their reasoning, rest partially on a premise which may well be false.

III. 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. The opposition parties have quickly said that they will attempt to influence the Brexit process via amendments to the Parliamentary act that will now be required. However, they lack a majority, and the nature of Art. 50 handicaps them severely: even if they were to bind the UK Parliament to a particular position, that would not mean it was achieved, but might just lead to stalemate, and to the expiry of the Art. 50 deadline without any agreement at all. In practice, negotiating power is likely to remain firmly in governmental hands.

**Gareth Davies\***

\* Professor of European Law, VU University Amsterdam, g.t.davies@vu.nl.

