

A Brief Review on Brexit Judgment of the Divisional Court

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Introduction

*R (Miller) v Secretary of State for Exiting the European Union*¹ is considered to be a UK constitutional law case initiated in 2016 by Gina Miller who is a business owner and an activist. The question, in the case, is whether the Crown's executive government is entitled to use the Crown's prerogative powers to give notice under Article 50 of the Treaty on European Union (TEU) for the UK to cease to be a member of the Union. It is an interesting case to study as there is the executive trying to exercise its powers through the royal prerogative. However, there is a contest between the legislature and the executive as to whether the power can actually be exercised. There is also the third institution – the judiciary to make the decision between the executive and the legislature as to who can trigger Article 50.

Background and the issue

The origins of this case go back to the EU Referendum in June 2016. 51.9 % of the British voted to leave the European Union. Therefore, the British people had brought to an end a relationship with Europe that they had first approved at a referendum in 1975. When the European Community (EC) was developed after World War II it was comprised of three organizations and there were six countries joined into the community. The UK joined in 1973. Two years later the first referendum was held, in which 67% voted in favor of staying in the community. In 1993 the European Community was rolled into the European Union based on the Maastricht treaty and treaty of Lisbon, which formed the constitutional basis of the EU [1].

Now the historic decision was taken by British voters in June 2016 to end their country's EU membership. Nine months later, the Conservative government triggered Article 50 of the Lisbon Treaty. Withdrawal from the European Union is the legal and political process whereby an EU member state ceases to be a member of the Union. Article 50 of the Treaty on European Union states that: "*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*" [2]. Therefore, it raises the question – what are the UK's own constitutional requirements. Furthermore, sub-article 2 states that: "*A Member State which decides to withdraw shall notify the European Council of its intention*". There is a question about who can decide that the notice should be given. I consider that practical difficulty is that EU law and UK law have been intertwined for the last 40 years and so undoing that mixing up legal systems involves a lot of hard and difficult work and complicated processes.

¹ R (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768

Furthermore, an interesting fact is that, as of September 2019, no member state has withdrawn from the EU or previously from the EC. Brexit would be the first example of a member state leaving the bloc using Article 50. French Algeria left the European Economic Community (EEC) following its independence from France in 1962; Saint Barthélemy left in 2012, and Greenland, an autonomous Danish territory, left in 1985 following a referendum [2]. However, the 'exit' of Greenland from the EC is legally speaking not a 'withdrawal' as Greenland was not a Member State of the EU but is part of an EU Member State, Denmark [3].

Legal bases for that triggering are what the case of Miller is about. The Miller case revolves around constitutional issues such as the power of the executive in conducting international relations, parliamentary sovereignty and citizens' rights under EU law.

Three categories of rights

According to the court's analysis there are three categories of rights:

- (i) Rights that can be replicated by UK law (e.g. 28 days paid holidays under the Working Time Directive) will continue to apply even if the UK leaves the EU. The reason is that EU Directives and other EU laws have been implemented by domestic legislation, whether primary or subordinate.
- (ii) Rights of UK citizens in other EU member states (e.g. the right to work abroad, or set up a business, under Treaty on the Functioning of the European Union (TFEU) Articles 45 and 49).
- (iii) Rights that cannot be replicated in UK law and will be lost (e.g. the right to vote in the EU Parliament or the right to seek a reference to the Court of Justice of the European Union (CJEU)). While the Secretary of State accepted that category (iii) rights would be nullified, the High Court ruled that all rights in categories (i) and (ii) would also be jeopardized in their effectiveness [4]. Parliament had given these rights as EU citizens when it enacted the European Communities Act (ECA) 1972. And it was the main legal argument of Miller that triggering Article 50 would destroy rights that were established by UK Parliament's decision and that it is not up to the government, without Parliament's approval, to use the prerogative power to take action affecting rights which Parliament had recognized in that way. In other words, what Parliament had given to people, the Government could not take away. In addition, the claimant argued that if notification under Article 50 were to be invoked to leave the European Union, it would effectively nullify a series of Acts of Parliament. It is a constitutional principle that Acts of Parliament cannot be changed without the consent of Parliament.

On the other hand, the government argued that the use of prerogative powers to enact the referendum result was constitutionally proper and consistent with domestic law. Therefore, Prime Minister Theresa May was legally permitted to trigger Article 50 using royal prerogative without first securing parliamentary approval. The first legal argument of the government was that, in general, the executive conducts negotiations and treaties with other countries and, in order for these treaties to then be brought into domestic law, it is up to Parliament to do this. An example of these was when the UK joined the EU: it was the government that conducted all of the negotiations and the treaty signings, and it was Parliament who brought this into force by way of the ECA 1972. The government argued that triggering Article 50 was part of the international negotiations and therefore should be conducted by the government. There was no need for Parliament to have a say. On a later stage, when actual Brexit happened, then would Parliament have a role; but at present, in the first stage, as it was conducted on the international plane, it

was up to the government only to perform this function. The government also argued that not a single document made any reference as regards triggering Article 50. For example, ECA 1972, European Union Amendment Act 2008 (that brought into force the Lisbon Treaty), European Union Act 2011, and Referendum Act 2015 did not make any mention of it at all. The government added that the British people voted to trigger Article 50 and it did not make sense to go back to Parliament to once again confirm what the British people had already decided. It could be an argument that the government was trying to use the royal prerogative to exercise the will of the people. The basis of the argument derives from the nature of the British constitution and the rule of law, which requires there to be a separation of powers between the legislature, judiciary and the executive.

Although the United Kingdom does not have a constitution to be found entirely in a written document, this does not mean there is an absence of a constitution or constitutional law. On the contrary, the United Kingdom has its own form of constitutional law. Some of it is written, in the form of statutes that have particular constitutional importance. Some of it is reflected in fundamental rules of law recognized by both Parliament and the courts [5].

The sovereignty of the United Kingdom Parliament: the cornerstone of UK constitutional law

Parliamentary sovereignty is the most important principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change [6].

In the book *Introduction to the Study of the Law of the Constitution* by the constitutional jurist, Professor A.V. Dicey explains that the principle of Parliamentary sovereignty means that Parliament has: “The right to make or unmake any law whatever and further, that no person or body is recognized by the law ... as having a right to override or set aside the legislation of Parliament [7, p. 36]”. According to Dicey: (i) Parliament is sovereign and can make laws on any subject; (ii) Parliament cannot be bound by its predecessor or by its successor; and (iii) no one may question the validity of an act of Parliament.

The case affirmed the doctrine of Parliamentary Sovereignty, as the government could not make major constitutional changes without the consent of Parliament. The court said: “It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme. Parliament can, by the enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation; an exception is when Parliament has itself made provision to allow that to happen. The ECA 1972, which confers precedence on EU law, is an example of this. But even then, Parliament remains sovereign and supreme and has continuing power to remove the authority given to other law by earlier primary legislation. Put shortly, Parliament has the power to repeal the ECA 1972 if it wishes” [8]. However, it is not a complete accurate notion of Parliamentary Sovereignty in the modern world. If we consider, for example, the Human Rights Act (HRA) 1998 it is a requirement that if an act enacted by Parliament is incompatible with HRA it must be mentioned that it is incompatible and courts can make a “Declaration of Incompatibility” with the HRA. This, in fact, puts into question the third point of Dicey that no one can question the validity of an act of Parliament. However, it should be noted that HRA was enacted voluntarily by Parliament and it was Parliament who decided the process by which legislation could be reviewed for convention compliance by the courts. Therefore, Parliament can,

if it wishes, pass legislation and repeal HRA in the future so the sovereignty of Parliament will again be recovered completely.

Relationship of Parliamentary Sovereignty and EU law

EU law is contrasted with parliamentary sovereignty. It is supreme over national law and seems contradictory to parliamentary sovereignty. UK law is to be interpreted in line with EU law. Thus, EU law is supreme in the UK but only because an act of Parliament says it is. There are different types of EU laws: Regulations and Directives. On the one hand, *Regulations* are directly applicable, as stated in ECA 1972 section 2(1). So as soon as the EU passes them they automatically become part of UK law: this could be seen as diminishing the role of parliamentary sovereignty, because there is no role for Parliament. On the other hand, *Directives* are a little bit different as Parliament has to pass a law in order for them to become part of the UK legal system. But if the UK decides not to implement a directive, then it can be sanctioned by the EU. Even though there is an influence from the national government in directives, this mechanism still ensures the supremacy of EU law recognized in section 2(4). As stated above, ECA is supreme just because Parliament allowed that to happen and Parliament has the power to repeal the ECA 1972 if it wishes.

Parliamentary Sovereignty and Referendum

While the 2016 Referendum was an act of great political significance, its legal impact was non-existent because of the lack of relevant provisions made in the European Union Referendum Act 2015. In UK, referendums are examples of political sovereignty: the electorate itself decides a particular issue, but in principle the result of the referendum is only binding in a moral sense. Parliament should reply to the referendum by responding directly to the will of the people, but the idea of parliamentary sovereignty is retained because Parliament still has to react to the referendum with the act of Parliament. In the case under discussion, claimants said that the referendum was consultative and only Parliament had the power to decide whether or not triggering article 50.

The Crown's prerogative powers

The Royal Prerogative is one of the most significant elements of the UK's constitution. The prerogative enables the UK government, among many other things, to deploy the armed forces, make and unmake international treaties and to grant honors [9]. However, there are limits to that power, and those limits have been tested during the course of the Brexit process. In the case *R (Miller) v The Prime Minister*², Prime Minister Boris Johnson used the Royal Prerogative to prorogue Parliament for an extended period, and the Supreme Court ruled that this use of the prerogative power was unlawful. The Supreme Court ruled in the Miller case as well that the government could not trigger the EU exit process without bringing it before Parliament.³ Because an act of Parliament was required to trigger Article 50, it has been suggested revoking would also need parliamentary approval.

² *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41

³ *R (on the application of Miller and another) v the Secretary of State for Exiting the European Union* [2017] UKSC 5

It is a constitutional principle that any exercise of prerogative powers by the government must be compatible with the law. The government may not use the prerogative to change domestic law or to prevent a statute from operating as Parliament intended. The use of the prerogative powers in foreign affairs, in particular, the making and unmaking of treaties, is consistent with the rule that the government cannot alter domestic law because international law and domestic law are regarded as operating in independent spheres: treaties between states have effect in international law and are not governed by domestic law, nor do they give rise to rights or obligations in domestic law. If an international treaty is to have any consequences in domestic law, it is for Parliament to legislate to bring the necessary changes into effect. Therefore, that was the main issue in the Brexit case, concerning prerogative powers. According to Miller and the claimants, the exercise of prerogative powers, in this case, could impact the citizens' rights in the UK. The Court agreed with the claimants that the fundamental constitutional principle is that the Government has "no power to alter the law of the land by use of its prerogative powers". It would remove rights created by Acts of Parliament. The principle of parliamentary sovereignty required that only Parliament could take away those rights.

International relations, in general, are considered to be Royal Prerogative which is exercised by the crown. As explained in the judgment: "The Crown has only those prerogative powers recognized by the common law and their exercise only produces legal effects within boundaries so recognized. Outside those boundaries, the Crown has no power to alter the law of the land. This subordination of the Crown (i.e. the executive government) to the law is the foundation of the rule of law in the United Kingdom. It has its roots well before the war between the Crown and Parliament in the 17th century but was decisively confirmed in the settlement arrived with the Glorious Revolution in 1688 and has been recognized ever since" [10]. No prerogative power is superior to an Act of Parliament, and where a conflict arises it is statute law that prevails. This was recognized as early as the 17th century. Sir Edward Coke reports in *The Case of Proclamations* (1610): "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm" and that: "the King hath no prerogative, but that which the law of the land allows him." The position was confirmed in the first two parts of section 1 of the Bill of Rights 1688 [11].

The status and character of the 1972 Act

The effect of the European Communities Act 1972 is to constitute EU law as an automatic and overriding source of law in the UK. For as long as the UK is a member of the EU, the EU treaties and regulations are directly applicable and EU directives are implemented by way of delegated legislation. Further, any domestic legislation must be consistent with EU law or it will be ineffective. This does not, however, prevent Parliament from deciding, if it repeals the 1972 Act, that EU law should no longer affect the UK. If the UK withdraws from the EU, the legal effect will be that, while the directives transposed into UK law will remain in force, the EU treaties and regulations, and the rights they confer, will no longer be applicable. EU statutes did not restrict the executive's power to make or withdraw from an international treaty. The legislation would be needed to implement withdrawal, but not to initiate it. The uniqueness of section 2(1) is that it gives effect to directly applicable or effective EU law without the need each time for implementing legislation, as would usually be required for the incorporation of other obligations assumed under international law by a dualist State [12]. Unlike many European countries, which are monists, the UK is a dualist state. In a monist state, a treaty obligation becomes directly applicable in domestic law

simply by the act of ratification. While in dualist states a treaty ratified by the government does not alter the laws of the state unless it is incorporated into national law by legislation. This is a constitutional requirement- until incorporating legislation is enacted; the national courts have no power to enforce treaty rights and obligations.

The ECA 1972 as a constitutional statute

European Communities Act 1972 and the European Union Referendum Act 2015 have constitutional nature. Nevertheless, a counterargument is that in the 1970s, there was no indication from Parliament that they intended it to be such a piece of law. When King John signed Magna Carta in 1215, he probably did not intend that the rules of habeas corpus would be still in place 800 years later. Just because the relevant authority does not declare something to be constitutional statute does not mean it cannot be so. The ECA offers a wide range of rights to UK citizens and intertwines UK and EU law to such an extent that this piece of law does take on constitutional importance. For example, the Human Rights Act 1998 is a constitutional statute because it has such a huge impact and does not matter how long it has existed. Whether a statute is constitutional or not is not dependent on how long it has been in force or what Parliament intended about that time.

Holding and appeal to the Supreme Court

In its judgment, the Divisional Court held that the UK government was not entitled to initiate the withdrawal from the European Union by formal notification to the Council of the European Union as prescribed by Article 50 of the Treaty on European Union without an Act of the UK Parliament permitting the government to do so. The court ruled that the government had no power to trigger notification under Article 50 of the TEU because it would remove rights created by Acts of Parliament. The principle of parliamentary sovereignty required that only Parliament could take away those rights [13].

The Divisional Court conceded that triggering Article 50 was related to international relations, but argued that leaving the EU had a direct impact on domestic law by depriving people of their rights under the ECA 1972. Brexit will definitely have an impact on individual rights and this is the reason why it requires parliamentary approval first. Hence, it would be unlawful for Theresa May to start Britain's formal exit from the EU without an Act of Parliament being passed first. The case was seen as having constitutional significance in deciding the scope of the royal prerogative in foreign affairs.

The Supreme Court heard the appeal from this judgment in January 2017 and by a majority by eight judges to three upheld the Divisional Court ruling, finding that authorization by Parliament was required for the invocation of Article 50. The court also held that the referendum result was no legal authority to give notice. The Supreme Court also ruled that devolved legislatures in Scotland, Wales and Northern Ireland had no legal right to veto the act and that the Parliament of Westminster did not need the consent of the devolved parliaments to give notice. For the first time ever, the Supreme Court sat *en banc*, meaning that all sitting justices heard the case.

The European Union (Notification of Withdrawal) Act 2017 is an Act of Parliament of the United Kingdom to empower the Prime Minister to give to the Council of the European Union the formal notice – required by Article 50 of the Treaty on European Union – for starting negotiations for the United Kingdom's withdrawal from the European Union. So it will end the supremacy of EU laws in the UK after Brexit. The Act was passed following the result of the decision of the (United Kingdom) Supreme Court on 24 January 2017 in the judicial review case of R (Miller) v Secretary of State for Exiting the European Union and was the first major piece of Brexit legislation to be passed by Parliament following the referendum [14]. In conclusion, by deciding this case Supreme Court set the precedent for future international relations of the UK.

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