



Supreme Court Brexit Rulings – what now?

Chair: Philip MoserQC

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Prerogative Powers in *Miller*: An Analysis of Four E's

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Article 50 TEU

*1. Any Member State may **decide** to withdraw from the Union in accordance with its own **constitutional requirements**.*

*2. A Member State which decides to withdraw shall **notify** the European Council of its **intention**...*

Framework: Four E's

- Existence
- Extent
- Exclusion
- Exercise

Existence

- Diplock LJ in *British Broadcasting Corporation v Johns* [1965] Ch 32 at p. 79
- *R(Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 at [34] and [54]

Extent

- **General limitations** to prerogative generally
 - Cannot change domestic law – [40] to [50]
 - Cannot frustrate Acts or pre-empt them – [51]
 - Cannot affect domestic rights – [83]
 - Bill of Rights – [41]
- **Specific limitations** to the foreign relations treaty prerogative
 - Limited to international law sphere – [54] to [58]

Exclusion

- Abrogation by statute (whether expressly or by necessary implication)
- Majority – “...rather than the Secretary of State being able to rely on the absence in the 1972 Act of any **exclusion** of the prerogative power to withdraw from the EU Treaties, the proper analysis is that, **unless that Act positively created such a power in relation to those Treaties, it does not exist**” ([86]).
- Lord Reed (minority) – [194]

Exercise

- *Council of Civil Service Unions v Minister for the Civil Service* (“the GCHQ case”) [1985] AC 374
- *R(Bancoult) v SSFCA* (“Bancoult No 2”) [2009] 1 AC 453 at [35]

Extent: application – the effects on domestic law/rights

The majority

- Changes to law e.g. ECA 1972
- Treaties with a capital T
- Purpose of ECA 1962
- EU law as source of domestic law
- Nature of, and effects on, rights
- Withdrawal vs variations

Lord Reed (minority)

- No changes to law e.g. ECA 1972
- EU law not a source of *domestic* law
- Conditional/contingent statutes
- Ambulatory rights
- (No) effects from notification

Implications

- Parliamentary sovereignty
 - Executive vs legislature
 - RoR & place of EU law
- The foreign relations prerogative
 - Non-justiciability – [55] & [92]
 - Limitations – ECHR?
- More stringent control of the prerogative
 - Both effects on domestic laws *and* rights
 - Frustration / pre-emption
 - Bill of Rights?

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Article 50 – Miller v SSEU Rights impact assessment



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What is *Miller* all about?

About:

- Narrow legal question re repealing statutes
- Balance of powers between Legislature and Executive and the judiciary
- Difference between legal sovereignty and political sovereignty
- Inter-State Relationships between the UK and the EU under a dualist model
- Internal devolution relationships
- Relationships between the State and individuals
- Fundamental status of EU rights

NOT about:

- The outcome of the referendum
- The merits of leaving EU
- The precise form of Brexit to be pursued
- How Parliament should vote in relation to future bill

Article 50 TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

EU as a “source of law”

- **Section 2(1) ECA 1972:**

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression [F1 “enforceable EU right”] and similar expressions shall be read as referring to one to which this subsection applies.

- **Section 1(2) ECA:** List of “Treaties” approved by Act of Parliament prior to ratification

- **Case 26/62 Van Gend en Loos [1962] ECR, §12:**

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.

Constitutional statute or “conduit”?

Impact on rights

- Fundamental constitutional principle that “*Royal prerogative does not enable ministers to change statute law or common law*” without primary legislation [SC 50]
- Illicit changes to domestic law [SC 51]:
 - Change to the source of law;
 - Remove or curtail rights;
 - Frustrate the purpose of a statute;
 - Emptying rights of their content;
 - Preventing their effectual operation.

Impact on rights

- Permitted interference [SC 52-53]:
 - Inherent authorisation in the prerogative power to affect individual rights – e.g. *Burmah Oil*
 - Change to the facts e.g. declaration of war
 - Change to extent of the application of the law

“From time to time” [SC 74-83]

- Scope of rights and remedies may change with the UK’s obligations from time to time under the Treaties
- 1972 Act does not contemplate abrogation of EU law by prerogative act
- **Vital difference** between changes in domestic law from variations to content of EU law and changes from withdrawal – fundamental change to the constitutional arrangements of the UK
- Difference in kind rather than just *degree*

Impact on EU rights

Category 1 Replicable rights

- Part of national law e.g. equality or employment protections
- Can be replicated by GRB into domestic law
- Source, scope & effect different
- DC/SC held no answer that they may be preserved in GRB.

Category 2 Negotiable rights

- Cross border rights to free movement and citizenship
- Exercised by EU nationals in the UK or UK citizens abroad
- No guarantee that final arrangements will protect them.
- No guaranteed transitional protection

Category 3 Irretrievable rights

- “Club” rights
- Rights and remedies guaranteed by EU law e.g. stand or vote in European Parliament elections, complain to the Commission or seek a preliminary reference
- Funding and subsidies
- Will be irretrievably lost on exit



The Great Repeal Bill

- Government conceded that Article 50 will necessarily remove or affect EU rights [SC 69]
- Once UK departs EU, EU law will cease to be a source of domestic law [SC 80]
- The GRB will repeal s.2(1) ECA:
 - Implement some of existing EU rights into domestic law where appropriate
 - Mind the Gap - some Regulations have never been implemented because of direct application
 - 8000 SIs fall away once 1972 Act repealed
 - Many statutes unworkable or unenforceable
 - Delegated legislation – Henry VIII clauses



Ongoing status of EU law?

- Depends on the exit model – EFTA, Swiss model, WTO, bespoke trade agreement
- Parliament will scrutinise the exit arrangements and ratify any agreement
- Status of domestic statutes that incorporate EU law or enforcement mechanisms?
- Role of national courts:
 - Literal or purposive interpretation?
 - EU law as evidence of foreign law?
 - Residual “shadow” influence?

Thank You Any Questions



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What happens next?

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1 Power to notify withdrawal from the EU

- 1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.
- 2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

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