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UK Supreme Court Confirms Only Parliament Can Start Formal Brexit Process

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In its widely anticipated judgment in *R (Miller and another) v. Secretary of State for Exiting the EU*, the UK Supreme Court confirmed on 24 January, by an 8 to 3 majority, that the British government is prevented from initiating the formal process for leaving the European Union ('Brexit'), as provided for by Article 50 of the EU Treaty, without specific authority to do so from Parliament. This must take the form of an Act of Parliament, which must be passed by the House of Commons and House of Lords and given Royal Assent by the Queen.

In this respect, the Supreme Court has upheld the first instance judgment of the High Court of 3 November 2016 in favour of the applicants. The High Court granted the Government leave to appeal its judgment direct to the Supreme Court (thereby leap-frogging the Court of Appeal), in light of the case's constitutional importance and the urgency of resolution. In light of the defeat of the Government's appeal, the Secretary of State for Exiting the EU, David Davis MP, confirmed to the House of Commons within hours of the Supreme Court's judgment that the Government would bring a "straightforward Bill" before Parliament "within days", with publication now confirmed for 25 January.

The Government was more successful on questions addressed by the Supreme Court concerning the extent to which the devolved administrations of the UK (which enjoy varying degrees of autonomy from central Government in their administration of, respectively, Scotland, Northern Ireland and Wales) had to be involved in the Brexit process. On this aspect, the Court confirmed that the departure from the EU was solely a matter for the UK Parliament and Government to determine and that, as a result, none of the devolved administrations had a legal right to consultation on, or a veto over, its terms or timetable.

Background

The UK joined what is now the EU on 1 January 1973. Despite the length of the UK's membership, and the extent of its integration with the wider European economy that has developed over more than 40 years, when presented on 23 June 2016 with a referendum on whether the UK should remain a member or leave the EU, a slim majority of British voters indicated a desire to leave.

While the political impact of the vote was undoubtedly enormous, as indicated by the fact that both the UK's Prime Minister David Cameron and its European Commissioner Lord Hill resigned almost immediately, the legal effect was uncertain. This was essentially because the legislation under which the referendum took place (the European Union Referendum Act 2015 (EURA15)) made no provision for the effect of a leave vote. Similarly, the European Communities Act 1972 (ECA72), which provides the primary mechanism for integrating the EU and EU legal systems, is silent on the legal mechanism for departure.

Under the now famous Article 50 of the EU Treaty, a Member State may leave the EU only by following the procedure specified in that article. This requires the Member State to: (i) *decide* to withdraw "in accordance with its own constitutional requirements"; and (ii) *notify* its intention to withdraw to the European Council, after which the Member State and the EU must negotiate the terms of withdrawal, to be set out in a withdrawal agreement. Crucially, under Article 50(3), membership ends when provided for by the resulting agreement or, if no agreement has been concluded within two years of the "intention to withdraw" being notified, the Member State concerned is automatically ejected.

Notwithstanding the fact that the referendum was, at least in law, purely advisory, the Government of the new Prime Minister, Theresa May, made it clear that it would proceed with implementing the result, under the banner that "Brexit means Brexit". The question was whether it was entitled to do so. To the extent that it had given the matter prior thought, the Government appears to have been working on the basis that it was free both to decide to leave the EU and to notify this decision to the Council, without any further involvement of Parliament. In reaching this conclusion, it was relying on a combination of the political force of the referendum result itself

(according the referendum a novel form of superior constitutional status) and the Royal prerogative. The latter principle, which dates from the days of absolute monarchy, entitles the Government (notionally acting on behalf of the Crown) to enter into and terminate international treaties without recourse to Parliament. This is subject to the important proviso that, under the UK's dualist regime, such treaties have no effect in domestic law unless and until they are approved by Parliament.

While the referendum did not trigger an immediate Article 50 notification, as David Cameron had originally suggested it would, Theresa May promised in October last year that her Government would send its notification to the Council by 31 March 2017, thereby ensuring that Brexit would take effect before the next General Election. Presumably to the Government's surprise and displeasure, two individuals who (in common with all UK citizens and many other UK residents) stood to lose important rights on the UK's departure from the UK brought judicial review proceedings against the Government querying ministers' ability to trigger the process provided for by Article 50 on their own. Their main argument was that notification would inevitably lead to the departure of the UK from the EU and a subsequent loss of the rights they enjoy as EU citizens. Although it was common ground that withdrawal from treaties is covered by the Royal prerogative, the fact that notification of an intention to withdraw from the EU Treaties would ultimately override the ECA72, i.e. a statute approved by Parliament, or at least render it devoid of meaning, this would be contrary to the well-established constitutional principle of Parliamentary sovereignty. Since it flows from this principle that the Royal prerogative does not permit ministers to overrule a statute, the applicants' argument was that Article 50 process could not be started by a Government minister but required explicit Parliamentary approval through a new statute.

The High Court judgment

On 3 November 2016, the High Court (sitting as a divisional court of three Court of Appeal judges, reflecting the importance of the issue) ruled against the Government, finding that the constitutional implications of initiating the Article 50 procedure were so far reaching that a statute was required to authorise notification. The Government promptly appealed that judgment straight to the Supreme Court.

The Supreme Court judgment

In an unprecedented move, all 11 of the Supreme Court justices heard the case. Mindful no doubt of the reaction to the High Court's judgment, in its judgment the Supreme Court went to great lengths to emphasise that it was deciding the purely legal question of *how* the UK could lawfully start the process of leaving the EU, rather than the question of *whether* it should leave, as that was a political question on which the Court could not have a view. The Court also left the extent of any new statute open, noting that, while it could be "very brief", this was a matter for Parliament.

Rather, the Supreme Court was required to grapple with fundamental principles of constitutional law in reaching its verdict of how the process for Brexit could commence. In analysing this question, the Court had to reconcile two well-established constitutional rules: (1) that Government ministers cannot use the Royal prerogative to overturn domestic laws that are enshrined in an act of Parliament; and (2) that Government ministers can use the Royal prerogative to make and unmake treaties (which are instruments of international law).

The difficulties of the task in this case primarily arise from the unique nature of the EU law regime, which blurs the traditional line between domestic and international law. Consistent with the ambition of its founders, although the EU is a creature of its founding treaties, which are entered into by sovereign Member States, it has its own legal personality and a distinct constitutional order that confers directly enforceable rights, and imposes corresponding obligations, on individuals and companies that may override the domestic laws of the Member States.

The drafters of the ECA72 were faced with a challenge in reconciling such a concept with the fundamental principle of Parliamentary sovereignty, which holds that the UK parliament is the supreme body in UK law. They resolved this rather elegantly, by providing a mechanism under which the ECA72 itself acts as the essential conduit through which the entire body of EU law, as it exists from time to time, flows into domestic UK law, without any further legislative steps being required, hence ensuring its 'direct effect'. This dynamic approach was unprecedented in its scope and implications.

While the High Court's judgment relied primarily on according the ECA72 a special status as a constitutional statute, which conferred a higher degree of protection from executive action, the Supreme Court went a step

further by emphasising the role of the EU as an "independent and overriding source of domestic law" in the UK. The conclusion that, as long as the ECA72 remains in force, "the EU Treaties, EU legislation and the interpretations on [them] by the Court of Justice are direct sources of UK law" is important in constitutional terms, since it makes it clear that the ECA72 is not itself the "originating source" of EU law but rather acts as a "conduit pipe" to convey EU law into domestic law.

In a key passage, Lord Neuberger (for the majority) stressed that withdrawal from the EU would inevitably lead to the loss of this independent source of domestic law, which would represent "a fundamental change in the constitutional arrangements of the United Kingdom" that is "different not just in degree but in kind from the abrogation of particular rights, duties or rules derived from EU law". As such, it was as momentous as the decision to join in the first place, which had of course necessitated a statute in the form of the ECA72.

In the view of the majority, it was simply unacceptable that such a far-reaching constitutional result could be effected by a minister under the Royal prerogative, in the absence of statutory provision. While the Government attempted to address this by arguing that the ECA72 itself provided the necessary authority, this was a challenging argument to sustain given its silence on the circumstances in which its own repeal might arise. Accordingly, the majority dismissed the Government's arguments that the dynamic process of EU law implementation introduced by the ECA72 could even encompass such a dramatic change as the UK's departure from the EU itself.

In a phrase that nicely encapsulates the distinction drawn by the majority between the ECA72's ability to accommodate changes in the law and the inability to read the statute as providing authority for its own demise, Lord Neuberger concluded that *"the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law"*. In another memorable passage, Lord Neuberger likened the process undertaken by the ECA72 as a graft, going on to conclude that, when joining what became the EU, it was *"most improbable that [ministers and Parliament] had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament"*. Put another way, ministers were not entitled unilaterally to dismantle *"the very system which they set up in a coordinated way with Parliament"*.

The majority was also unconvinced by the argument that the fact that Parliament would inevitably be involved in the detailed implementation of withdrawal, including through a promised 'Great Repeal Bill', was sufficient. In the view of Lord Neuberger, this argument missed the point, since the "die will be cast" once notice is given.

Given the inevitability of Brexit at that point, the majority concluded that giving the Article 50 notice itself changes domestic law. This conclusion relied on the assumption that a withdrawal notification under Article 50 cannot be revoked, and the departure process halted, once it has been sent. Although this is by no means clear under Article 50 itself, and is ultimately a question of law that only the Court of Justice of the EU can answer, the Government chose to work on the assumption that a notice is irrevocable once sent. (Or, as leading counsel for Ms Miller memorably put it, once the trigger of notification is pulled, "the bullet will hit the target and the Treaties will cease to apply".) The fact that the Government chose to deny itself what was potentially a powerful weapon indicates the political toxicity of adopting a position that implied that it could have second thoughts, contrary to the "Brexit means Brexit" mantra. In any event, the logic of the Court's approach is that, even if revocation was a *possibility* and further primary legislation to deal with the consequences of Brexit was a *probability*, the fact that, once given, notification unleashed a process, the result of which could be automatic departure from the EU without any further action being taken was sufficient.

The court dealt easily with the question of the impact of the referendum itself, noting that, since the EURA15 did not provide for what would happen in the event of a leave vote, its force was "political rather than legal". As such, the EURA15 could not provide the statutory authority required. Neither was the Court impressed with the Commons resolution on 7 December 2016 calling on ministers to give notice by 31 March 2017, simply noting that "a resolution of the House of Commons is not legislation". In conclusion therefore, a new statute (however brief) is required.

Taken together, at 48 pages the dissenting judgments of Lords Reed, Carnwath and Hughes are as long as the majority judgment. The arguments can nevertheless be dealt with more briefly. Lord Reed tackled the tension between acceptance of the existence of EU law as a free-standing source of domestic law and the doctrine of Parliamentary sovereignty head on, declaring that the long-standing principle that EU law amounts to "its own legal system" (as confirmed by the European Court of Justice in *Van Gend en Loos* in 1963 and *Costa v. ENEL* in 1964) as *"incompatible with the dualist approach of the UK constitution and ultimately with the fundamental*

principle of Parliamentary sovereignty".

While he agreed with the majority that the key to this apparent conundrum lay in the ECA72, Lord Reed took a different approach in concluding that, even if statutory authority was required, the Act itself permitted Article 50 to be triggered by ministers. Just as the ECA72 had no effect when first enacted, since it required the UK's accession to what became the EU to fill it with meaning, Lord Reed saw it as not fundamentally incompatible for the Act to return to having no effect once those treaties no longer applied to the UK. The ECA72 simply created a *"scheme under which domestic law tracks the obligations of the UK at the international level, whatever they may be"*. On this approach, the fact that it would become an empty shell at the point of Brexit would not conflict with the will of Parliament, as it will simply have ceased to fulfil the purpose for which it was originally enacted.

In a key passage that reveals the fundamental difference in approach between majority and minority, Lord Reed also stressed what he viewed as the "conditional basis" of the EU law rights to which the ECA72 gives effect. In a passage liable to put the nose of an ECJ judge severely out of joint, Lord Reed opined that, rather than the EU being a "source of law" in the fundamental sense, the UK's "rule of recognition" accords EU law a subordinate status that is "entirely dependent on statute", akin to a statutory instrument. As such, the status of EU law in the UK remains "inherently contingent on the UK's continued membership of the EU" and the fact that it ceases to have any effect on withdrawal flows from that principle and the ECA72 itself.

Lord Carnwath's dissenting judgment introduced a further, subtle argument, under which he stressed the role of Parliamentary scrutiny of ministers' actions as an equally important expression of Parliamentary sovereignty, alongside the enactment of statutes. In his view, triggering Article 50 was *"merely the start of an essentially political process of negotiation and decision-making"* conducted by the Executive, which would be accountable to Parliament throughout. Furthermore, this process would be completed through primarily legislation.

Viewed in this light, Lord Carnwath considered that the applicant's trigger/bullet analogy was "fallacious". While he acknowledged the extent of the loss of rights arising from Brexit, and the scale of the task faced by the Government in ensuring that as many of them as possible were preserved in domestic law thereafter, Lord Carnwath stressed that resolution would inevitably require *"a partnership between Parliament and Executive"*. In his view, this did not alter the fact that a statute was not required to initiate the process. Conceding that he was in the minority, he noted that *"a bare statutory authorisation for the service of the notice"* in the form of a short bill providing authority would not resolve any of the challenges ahead and instead risked being viewed *"as an exercise in pure legal formalism"*.

Devolution questions

The Court was more united on the questions before it concerning the extent to which the UK government was obliged to consult the UK's devolved administrations in Scotland, Northern Ireland and Wales on the terms for Brexit. Given the strong opposition to Brexit from the Scottish Government (reflecting the fact that 60% of Scots voted to remain in the EU, as well as the governing party's desire to see an independent Scotland), any suggestion that it had a veto over Brexit would have been politically explosive.

Having dismissed the suggestion that the Northern Ireland Act 1998 has any relevance for the Brexit process, the Court turned to consideration of the "Sewel convention". This convention, which arose from the process of Scottish devolution, states that, while the UK Parliament retains the formal power to legislate on matters that have been devolved, it will not normally do so without the agreement of the devolved legislature. The Court unanimously confirmed the principle that conventions are political in nature, with no legal force. In the words of Lord Neuberger, *"Judges … are neither the parents nor the guardians of political conventions; they are merely observers"*. The fact that the Sewel convention was reproduced in the Scotland Act 1998 did not alter this, since that statute must have been intended simply to recognise its existence as a political convention, rather than transforming into a justiciable principle.

Implications

While the High Court's judgment was met with howls of outrage from some Brexit-backing politicians and more excitable newspapers, as well as a spike in the value of the pound, the reaction to the Supreme Court's judgment was more muted and measured. The judgment's constitutional significance is nevertheless immense, in that it wrests formal control of the Brexit process from the Prime Minister and her ministers and requires them to seek the approval of their course from both Houses of Parliament. Neither house is likely to prevent triggering

Article 50, given the immutable political fact of the referendum result. As a result, it is likely that Brexit still means Brexit. MPs and Lords will still ask difficult questions and hold ministers to account. The opposition Labour Party, Scottish National Party and Liberal Democrat Party have already committed to introduce a large number of amendments, in an attempt to tie the hands of ministers in future negotiations, cause embarrassment or at least to force debate of key aspects of the Government's plans that remain unclear.

As such, the political dynamic has shifted. This can be seen from the fact that, whereas just a week before the Government's position was that nothing more would be said regarding its negotiation objectives, following the Prime Minister's Lancaster House speech, the day after the judgment the Prime Minister confirmed to the Commons that the plan would in fact be published in the form of a white paper, as the Commons' own Brexit committee had recommended. The short authorisation bill will be published the following day, on 26 January. The Government remains publicly committed to completing the legislative process in time for it to send its notice of withdrawal before the self-imposed 31 March deadline. Whether this is now achievable remains to be seen.

It should be borne in mind that, whatever its constitutional significance, this judgment simply concerned the terms under which the process for leaving the EU could start. What happens after that, once negotiations begin in earnest, remains unclear. It is nevertheless fair to observe that, in the words of a British statesman from an earlier age, while the judgment is not the end of the process, or even the beginning of the end, it is perhaps the end of the beginning.

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