Brexit Editorial Vol 23 Is 1, Feb/March 2017

1 'IT'S MY PREROGATIVE'

In the last editorial I referred to the litigation challenging the UK Government's refusal to allow Parliament to have a vote before the government triggered the Brexit process under Article 50 TEU. This was *R (Miller) etc v. Secretary of State for Exiting Europe*.[1] The judgment was issued on 3 November 2016. There was also litigation in Belfast on similar points and additional questions of law involving devolution which was decided on 28 October. I will refer to this case below.

Miller has fomented more controversy and public debate than any other constitutional case in our living legal history. The case sets the courts at the heart of our constitution confirming the justiciability of the common law constitution. For some the case was a vindication of the rule of law and Parliamentary sovereignty. For others, it set the judges up as 'enemies of the people' as the *Daily Mail* protested in its headline the day after judgment. The judges, it was claimed, were seeking to subvert the will of the people to leave the EU as expressed in the referendum decision of 23 June 20. Such a claim is arrant nonsense and profoundly ignorant of law and legal process. I make this point knowing that those who criticized the ruling in such terms will never understand why they are so profoundly wrong. The judges did what their constitutional mandate requires of them: to hear a case and to give judgment without fear or favour in accordance with the law.

In *Miller* there was a challenge by judicial review to the Prime Minister's plans to invoke Article 50(2) TEU by use of the prerogative powers of the Crown without reference to Parliament. The Government had conceded that there would be 'proper scrutiny' of the plan for departure by the Commons. But no guarantee had been given that there would be a chance to vote on the negotiating position and proposals and certainly no undertaking to confirm approval in legislation. Such legislation would have to be agreed by both Houses and assented to by Her Majesty. The Prime Minister's (PM's) concern was that too much of her negotiating

[1] [2016] EWHC 2768 (Admin). The transcript of oral proceedings is available at https://www.judiciary.gov.uk/publications/santos-and-m-v-secretary-of-state-for-exiting-the-european-union-transcripts/ (accessed 9 Jan. 2017). I am grateful to Professor Alison Young for very helpful comments. The usual disclaimer applies.

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strategy with the EU would be revealed and possibly amended in a Parliamentary legislative process. This, she believed, was not in the national interest.

My view before proceedings commenced on 13 October in *Miller* was that there was no *legal* case requiring approval and legislation to approve notice under Article 50(2). Article 50(1) provides that any state may decide to withdraw in accordance with its own constitutional requirements. Article 50 is a *route* to treaty making – an eventual treaty to depart from the EU. The treaty making powers of the UK government reside constitutionally in the prerogative of the Crown. The prerogative power is the ancient common law power of the Crown now largely exercised by ministers of Her Majesty's (HM) executive government. From the early years of the seventeenth century the courts can enquire whether a prerogative power exists and whether it has been exercised within its proper remit.[2] The 'taming' of the prerogative by the courts has been one of the unqualified successes of the courts since the 1980s.[3] Although the prerogative is described as the 'residue of arbitrary power' preserved to the Crown and recognized by the common law, evoking an image of clanking chains in dismal dungeons, in reality it is today subject to judicial review. But the courts have always been vigilant to recognize the limits of their interventions in the exercise of the prerogative. The more political the issue, such as treaty making, the more the courts are out of their capability, expertise and domain in attempting to structure prerogative powers with legal principles. In other words, to subject the prerogative to the process of justiciability. As Lord Brown Wilkinson observed in one of the landmark cases [*FBU*] where the courts had confined the prerogative powers 'judicial review is as applicable to decisions taken under prerogative powers as to decisions taken under statutory powers save to the extent that the legality of the exercise of certain prerogative powers (e.g. treaty making) may not be justiciable.'[4] A further factor affects treaty making which I explain below.

Conversely, the more the prerogative impacts on individual rights and recognized public law rights the more vigilantly the courts will subject the power to judicial scrutiny and discipline. Two further points should be made. The English courts have held for centuries that the prerogative power cannot alter the law of the land or impose new criminal offences.[5] The first part of this doctrine

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2 *Case of Proclamations* [1611] Co Rep 74.

3 *Council for Civil Service Unions v. Minister of the Civil Service* [1985] AC 374 and *R (Bancoult) v. Foreign Secretary No 2* [2008] UKHL 61; *see R v. CICB ex p Lain* [1967] 2QB 864. *See Taming the Prerogative* Public Administration Committee HC 422 (2003–2004).

4 *R v. Secretary of State for the Home Department ex p Fire Brigades' Union* [1995] UKHL 3, 11 [hereinafter *FBU*].

5 *Case of Proclamations*, above n. 2. However, the prerogative operating at the international level may extend the scope of existing domestic law in eg territorial jurisdiction: *Post Office v. Estuary Radio* [1967] 2 Lloyds Rep. 299.

was at issue in *Miller*. The Bill of Rights of 1688–1689 enacts a part of that basic principle in its prohibition of prerogative either suspending or dispensing with laws. These provisions owe much to James II's propensity to suspend/dispense with laws to allow Roman Catholics to be appointed to high office. Furthermore, a prerogative may be replaced by statute if the statute covers the same subject area as the prerogative.[6] The subject area of the prerogative is 'occupied' by the statute but this may still leave very difficult questions as to whether there remains an area within the prerogative power, i.e. the statute is not comprehensive.[7]

The usual doctrine is that the treaty making power, and attendant powers such as negotiations, are within the sole preserve of the Crown as representative of the nation state in international affairs. The domestic courts have no locus.[8] They have established a self-denying ordinance as it were. As a corollary our law takes no cognisance of treaties until incorporated into domestic law by statutes or regulations.[9] This is known as 'dualism' and it is a basic rule of UK constitutionalism. A complex body of law supports reference by UK courts to treaties to assist in interpreting statute or common law. If a treaty will on completion (ratification) interfere with common law rights or with statutory rights the courts may rule on breaches of such rights by the treaty.[10] If a statute provides that certain formalities have to be complied with before a treaty may be ratified and brought into effect, then non-compliance with those provisions may attract rulings of illegality on the part of the executive in the courts. Obvious examples here include the European Communities Act 1972 (ECA) and subsequent UK EU statutes providing for Parliamentary approval and other procedures before EU law can take effect within domestic law.[11]

2 *MILLER* AND THE GOVERNMENT CONCESSIONS

The government lawyers accepted in *Miller*, correctly I believe, that the matter was 'justiciable' i.e. appropriate for a court's examination and ruling. There was a question of law involving the legality of the use of the prerogative. The court accepted that the claimants had locus standi to bring proceedings 'since virtually everyone in the United Kingdom or with British citizenship will … have their

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6 *Att Gen v. De Keyser's Royal Hotel* [1920] AC 598.

7 *R v. Secretary of State for the Home Department ex p Northumbria Police Authority* [1989] QB 26. This is very pertinent for national security and public order considerations.

8 *J.H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2 AC 418, at 499E-500D, Lord Oliver.

9 *Ibid*.

10 *Walker v. Baird* [1892] AC 491 and *Laker Airways v. Department of Trade* [1977] QB 643.

11 *R v. Secretary of State for Foreign Affairs ex p Rees-Mogg* [1994] QB 552.

legal rights affected if notice is given under Article 50.' [paragraph 7]. Their interests were 'potentially affected' in a variety of ways.

This latter point is where the crux of the case is located. My view in the 12 October editorial was that no rights of the claimants or anyone else were actually removed, displaced or interfered with by the triggering of Brexit under Article 50(2). That would occur under UK law when a Bill was placed before Parliament to repeal the EC Act 1972 and subsequent legislation incorporating EU rights. This would be enacted before the conclusion (ratification) of the Brexit agreement under Article 50 so that the UK would leave the Union and Parliament would (if it were so minded) approve that treaty and repeal the law giving internal effect within UK law of EU law. A mismatch between EU law and UK law would have to be avoided. The Article 50 process was like a starting pistol and not a bullet being fired that was bound to hit its target and terminate EU rights (unless the government decided to continue them on a selective basis where possible as Mrs May suggested). However, my view was based on existing doctrine and was formed before the Government made crucial, and from the perspective of their case, fatal concessions.

This took the form of concessions that once Article 50 was brought into action by the PM, the rights under EU law enjoyed within the UK by virtue of the 1972 Act and subsequent legislation would be terminated. The Government (Her Majesty's Government (HMG)) accepted that Article 50 once invoked was irreversible. Hence, removal of EU rights was put into effect by invocation of Article 50 and there was no *locus poenitentiae*. The Government further conceded that notice under Article 50 would interfere with EU rights within the UK 'unavoidably' and not just 'probably'.[12]

My own view is that Article 50 when invoked is not irreversible. Paul Craig has blogged an opinion to this effect and I agree with his arguments.[13] What, for instance, if the UK were faced with economic melt-down or a change of government after an election in which 'Remain' was the central issue advocated by the successful party(ies)? In any event, the status of Article 50 is a matter of EU law and only determinable by the European Court of Justice (ECJ). Its meaning is not acte clair. But the concessions gave force to the claimants' arguments and were accepted by the unanimous court. There is a wider political context to the 'irreversible' concession. Nigel Farage had repeatedly proclaimed that the government

[12] Para. 104(3).

[13] http://ohrh.law.ox.ac.uk/brexit-foundational-constitutional-and-interpretive-principles-ii/.and http://ohrh.law.ox.ac.uk/miller-winning-battles-and-losing-wars/ (accessed 9 Jan. 2017).
See also Andrew Duff, *Brexit: What Next?* Statement to the Constitutional Affairs Committee of the European Parliament, 8 Nov. 2016, https://polcms.secure.europarl.europa.eu/cmsdata/upload/303548f7-ed4b-4a35-bfb8-efa4c183ff76/AFCO Brexit Memorandum 08-11-16 (Andrew Duff).pdf?emailid=5655d008cb56e60fc6447e22&segmentId=488e9a50-190e-700c-cc1c-6a339da99cab (accessed 9 Jan. 2017).

commitment to Brexit was half hearted. Announcing in court that Article 50 was irreversible might be seen as a vindication of Mrs May's emphatic support for Brexit. Anything else would have spelt political conflict. Farage has predicted rioting in the streets if the authorities back-peddle on Brexit.[14] But the legal concession by government lawyers cemented the claimants' case. And it was hammered home to maximum effect by their legal team.

3 INCORPORATING THE EU LEGAL EDIFICE

The question then fell as to whether Parliament through the ECA had preserved a Crown prerogative to abrogate or diminish EU rights without further recourse to Parliament. Could the PM seek to affect rights by the prerogative alone? The court's answer was understandably 'No'. Constitutional principles, it was ruled, must be applied to interpret the ECA. The axiological UK constitutional principle is Parliamentary sovereignty. The court saw its role as upholder of Parliamentary sovereignty. Constitutional judicial principles of interpretation include: non-retroactivity, access to justice, legality and the Crown should not have power to alter the law of the land by prerogative power.

The reasoning of the court is that the ECA 1972 created a special matrix of EU law within UK law, which by virtue of the ECA enjoys sovereignty over UK law, and removing this law could not be done by prerogative, only by law.[15] The ECA, especially section 2(1), is a statute of 'special constitutional significance'. It is certainly a constitutional statute and not subject to implied repeal.[16]

A basic constitutional principle is that the Crown cannot legislate by itself to change the law of the land. No problem. The Crown in Parliament (legislation) trumps the Crown alone (prerogative). 'In this context', the court observed and I quote at length:

> it is also relevant to bear in mind the profound effects which Parliament intended to produce in domestic law by enactment of the ECA 1972, which has led to its identification as a statute of special constitutional significance. The wide and profound extent of the legal changes in domestic law created by the ECA 1972 makes it especially unlikely that Parliament intended to leave their continued existence in the hands of the Crown through

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[14] Andrew Marr Show BBC TV, 6 Nov. 2016, http://metro.co.uk/2016/11/06/farage-warns-of-riots-over-brexit-ruling-in-clash-with-gina-miller-6238634/ (accessed 9 Jan. 2017).

[15] Para. 84. *See* J. Finnis who argues that the treaties create the rights, not Parliament: https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/ (accessed 9 Jan. 2017). However, the treaties are continually incorporated by UK statute and the 1972 Act stipulates how the EU rights are rendered effective in UK law i.e. incorporated.
For a selection of views *see* http://judicialpowerproject.org.uk/high-court-miller-judgment-expert-reactions/ (accessed 9 Jan. 2017).

[16] *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin) per Laws LJ; *R (HS2 Action Alliance) et al. v. Secretary of State for Transport* [2014] UKSC 3, para. 208.

> the exercise of its prerogative powers. Parliament having taken the major step of switching on the direct effect of EU law in the national legal systems by passing the ECA 1972 as primary legislation, it is not plausible to suppose that it intended that the Crown should be able by its own unilateral action under its prerogative powers to switch it off again.[17]

Secondly, the Crown's treaty prerogative operates solely in the international sphere, not the domestic. The court agreed that the Crown could make an EU treaty that did not affect domestic law.[18] What it could not do was enter an agreement under Article 50 *that would lead to change* (my emphasis) in our law without recourse to Parliament. 'In the very different context of the present case, the question is whether the Crown has power under its prerogative to withdraw from the relevant EU Treaties where such withdrawal will, on the Secretary of State's argument, have a major effect on the content of domestic law.'[19]

> Interpreting the ECA 1972 in the light of the constitutional background referred to above, we consider that it is clear that Parliament intended to legislate by that Act so as to introduce EU law into domestic law … in such a way that this could not be undone by exercise of Crown prerogative power. With the enactment of the ECA 1972, the Crown has no prerogative power to effect a withdrawal from the Community Treaties on whose continued existence the EU law rights introduced into domestic law depend … The Crown therefore has no prerogative power to effect a withdrawal from the relevant Treaties by giving notice under Article 50 of the TEU.[20]

Section 2(1) ECA and its continuing obligations 'imports an implied condition that the United Kingdom remains a member of the European Union and is bound by "the Treaties" and the Crown has not withdrawn from "the Treaties" through the exercise of its prerogative power.'[21]

> In our view, section 3(1), relating to the ability to seek references from the CJEU under what is now Article 267 TFEU and the obligation of national courts to determine questions as to the validity, meaning or effect of any EU instrument in accordance with the jurisprudence of the CJEU, is most naturally to be read in context as presupposing the continued applicability of EU law and the EU Treaties in relation to the United Kingdom unless and until Parliament legislates for withdrawal. As with section 2(1) and (2), [ECA] Parliament cannot be taken to have legislated potentially in vain by this provision, as would be the case if the Crown could itself choose to withdraw the United Kingdom from the European Union without the need for further legislation and thereby strip it of any effect whatever.[22]

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17 Para. 87.
18 *Rees-Mogg*, above n.11. The social chapter of the Maastricht Treaty which was not originally incorporated into UK law.
19 Para. 91.
20 Para. 92.
21 Para. 93(3).
22 Para. 93(7).

These lengthy extracts amount to this. Basically, an elaborate legal code provided for the introduction and addition of EU legal rights in the UK. One might add that it did so in a way that changed the UK constitution by introducing new sources of law and rights. It would be inconsistent if these rights could be removed without recourse to that statutory code and without further Parliamentary legislative approval.

> The ECA 1972 cannot be regarded as silent on the question of what happens to EU rights in domestic law if the Crown seeks to take action on the international plane to undo them. Either the Act reserves power to the Crown to do that, including by giving notice under Article 50, or it does not. In our view, it clearly does not.[23]

The analysis of the 'EU legislative framework from 1972' in the UK supported the claimants' principal case that:

> the ECA 1972 confers no such authority on the Crown, whether expressly or by necessary implication [ie to alter the law of the land by prerogative]. Absent such authority from the ECA 1972 or the other statutes, the Crown cannot through the exercise of its prerogative powers alter the domestic law of the United Kingdom and modify rights acquired in domestic law under the ECA 1972 or the other legal effects of that Act. We agree with the claimants that, on this further basis, the Crown cannot give notice under Article 50(2).[24]

4 WHEN ARE EU RIGHTS REMOVED?

But what actually displaces or removes 'continuing EU rights'? And when are they displaced? The court accepts that if the UK withdraws from the Treaties pursuant to a notice under Article 50(2) there will no longer be enforceable EU rights under section 2(1) EC Act 1972.[25] The concession of the Secretary of State is highlighted at the end of the judgment.

> Before us the Secretary of State's positive case was that, if the Crown is entitled to give a notice under Article 50, then *when it takes effect to withdraw* the United Kingdom from the European Union the effect of existing EU law under the relevant EU Treaties will cease and sections 2(1), 2(2) and 3(1) of the ECA 1972 will be stripped of their effect in domestic law without any requirement of further primary legislation.[26]

But, I would argue, the ECA will still be in force until repealed and this is what gives EU rights their force in UK law.

Was the Secretary of State correct? The notice does not withdraw the UK from the treaties. The *eventual agreement* struck under Article 50 will. This could be more than two years down the line. As I mentioned above, my submission is that

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23 Para. 94.
24 Para. 96.
25 Para. 51.
26 Para. 104(3).

Article 50 is not irreversible. Indeed, it seems procrustean to suggest that HMG could not withdraw notice. If it did withdraw the notice would the EU be likely to object? The means of withdrawal of an Article 50 notice are subject to a variety of procedural possibilities.[27] Firstly, that withdrawing notice is not possible. This I believe is wrong (above). Secondly withdrawing notice is solely at the discretion of HMG. I believe this to be arguable although an agreement on behalf of the EU would have to be acknowledged and received. The discretion would not be unconfined to that extent. Thirdly and fourthly two procedures are possible under Article 50. These are namely that for agreeing on exit [Article 50(2] and that for extending discussion beyond two years [Article 50 (3)]. There is also a procedure for re-joining the Union under Article 50(5). Why should any of these be applicable to a very different situation which is not expressly provided for? The simple truth is we don't know. This is a matter for the Court of Justice of the European Union (CJEU) as it is clearly a question of EU law. The Supreme Court may be reluctant to make a reference under Article 267 TFEU because of delay not because the notice has removed that right. The Supreme Court would have to tread carefully here. We should recall from the Vol 22(4) editorial that Mrs May wished to invoke Article 50 by 31 March 2017.

In short, if the notice is not irreversible, if notice can be withdrawn, then any interference with existing rights is contingent and not definite. In terms of a change in the law, it is only on the ground that rights are being removed or infringed that the courts have pre-empted the treaty making powers of the Crown. Only such a definite outcome requires legislative approval. A change in the law cannot be a future and contingent possibility. To repeat, rights will be removed when the eventual agreement with the EU is concluded and ratified and legislation is passed by Parliament to repeal the ECA 1972 before ratification. These events will have to be dovetailed. If HMG withdraws its concession could the Supreme Court nonetheless work on the basis that sending notice under Article 50 is akin to removing rights because by the time of the Great Reform Bill, which will maintain some EU rights as domestic rights, the matter is *fait accompli*? This would be consistent with the High Court (HC) ruling and was accepted by the Government.

Only the week before the judgment in the above proceedings the High Court in Belfast (HCNI) gave judgment in *McCord's Application*.[28] In these proceedings the HCNI court ruled that the Crown's prerogative to invoke Article 50 had not been displaced by statute and inter-governmental agreements and that challenges to invoking Article 50 based on Northern Ireland (NI) devolution statutes and devolution conventions were unsuccessful. The NI judge had not had the benefit of

[27] I am grateful to a discussion with Ian Harden on this point.
[28] [2016] NIQB 85.

extensive arguments on Article 50 and the ECA 1972 that were addressed to the HC in London, the London court remarked. The HCNI was unaware that it had been accepted before the London court on all sides that notice necessarily will have the effect of removing EU rights as something that was 'unavoidable' and not just 'probable'. The same must be said of the Belfast court's observation that at the point when the application of EU law in the United Kingdom changes, 'the process necessarily will be one controlled by parliamentary legislation, as this is the mechanism for changing the law in the United Kingdom.'

In essence, this latter point is the argument set out by the editor above although it necessarily must address features not addressed by the HCNI (according to the London court) which did not have to contend with the government's concession and the extensive argument on the UK's EU legislation. We await to see which way the Supreme Court travels. The judgment is expected in January 2017 and will be covered in the next issue.

5 PROBLEMS

The UK law of judicial review has travelled a journey that leaves it almost unrecognisable from 1972. Principles of English judicial review go back centuries. Much of this post 1972 development is because of the influence of EU and European Convention on Human Rights (ECHR) law on its basic principles.[29] This has been a force for the good for those who believe in legality and the rule of law. I do. The courts have emphasized the point that the executive must obey the law as a matter of necessity and not of grace – any counter proposition would reverse the result of the English Civil War.[30] To extend the prerogative is an argument that is a civil war and 350 years too late, said Diplock LJ in 1964.[31] Lord Brown Wilkinson has related how the 'constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them.'[32]

I accept these points as necessary and invaluable consequences of the rule of law. But *Miller* presents difficulties. As well as the basic reservation I have outlined above as to when rights are actually interfered with there is another problem. This relates to the remedy given by the High Court in London. It was a declaration that the government could not initiate Article 50 by prerogative power alone. The government lawyers are likely to press for more guidance on the remedy if the HC judgment is upheld. The

[29] P. Birkinshaw, *European Public Law: The Achievement and the Challenge* (2d ed., Wolters Kluwer 2014).
[30] Lord Templeman in *M v. Home office* [1993] UKHL 5, para. 3.
[31] *BBC v. Johns* [1964] EWCA Civ 2, para. 3.
[32] Lord Brown Wilkinson *ex p FBU*, 10.

clear implication was that legislation from both Houses with Royal Assent was required. This was not spelt out expressly. The courts have ruled in the past that they cannot force a minister to introduce a bill in Parliament. In *FBU* Lord Nicholls who was one of the majority against the government case said: 'a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature, not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature.'[33] Interference would be barred under Article 9 Bill of Rights.[34] Lord Mustill who dissented in *FBU* remarked: 'If the attitude of the Secretary of State is out of tune with the proper respect due to parliamentary processes this is a matter to which Parliament must attend.'[35] *FBU* did not require such interference. The majority ruled that an existing statutory scheme could not be unequivocally displaced with immediate, or almost immediate, effect by the prerogative. Spot on. Just imagine if this advice is heeded by the Supreme Court should it be minded to uphold the High Court. A declaration is issued but not an order of enforcement by mandatory order or injunction. What if Mrs May ignored it? We would be in territory last seen when an impasse was reached between the courts and Parliament (not the executive) in the nineteenth century.[36] Non observance by the government is most unlikely; unthinkable.

While *Miller* is the most dramatic illustration we possess of the courts upholding Parliamentary sovereignty, one has to ask who is sovereign here? Parliament was being by-passed (and belittled) by Mrs May. Mrs May sought support in *vox populi* through the referendum authorised under the 2015 legislation. Would Parliament have asserted its authority alone? There are ways in which it could have done so. Would Parliament have been that 'assembly of kings' without judicial support? *Miller* is richly illustrative of that 'twin sovereignty' of the Crown in its courts and the Crown in its Parliament.[37] Even if *Miller* is reversed by the Supreme Court the insight from Lord Bridge's dictum will be vindicated by the fact that Parliament will have to approve the agreement under Article 50 by resolution approving ratification[38] and Parliament will have to legislate on the removal of rights. And these matters will be justiciable.

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[33] *Ex p FBU*, 36–37. 'Clearer language or a compelling context would be required for judicial intervention'. And in *R v. Secretary of State for Employment ex p Equal Opportunities Commission* [1994] UKHL 2 per Lord Keith re refusal of declaration requiring Secretary of State to introduce legislation in accordance with EU law.

[34] *See HS2* note.

[35] *Ex p FBU*, 20.

[36] *Stockdale v. Hansard* (1839) 9 Ad & El 1; *Sheriff of Middlesex* (1840) 11 Ad & El 273.

[37] Lord Bridge in *X v. Morgan-Grampian* [1990] 2 All ER 1 at 13 (HL).

[38] Under the Constitutional Reform and Governance Act 2010 s. 22 the government may remove a treaty from the requirements of Parliamentary resolution for ratification under s. 20 under 'exceptional circumstances' which must be explained in a statement to Parliament (s. 22(3)(c)).

As Mike Varney and I have remarked, those who craved 'sovereignty' through Brexit (very often the same people who would happily by-pass Parliament) would not witness a return to the position in pre-accession 1972.[39] One needs only to add that in recent judgments the Supreme Court and the Court of Appeal are suggesting there are limits to what they will accept in primary legislation and Parliamentary sovereignty where that legislation breaches human rights or basic principles of the rule of law.[40] As Brexit unfolds, this scenario is likely to move centre stage as EU rights, including fundamental rights not in the ECHR, are unpicked and discarded following the anticipated Great Reform Act.

We await the Supreme Court decision. The Supreme Court heard interventions from Northern Ireland, Scotland and Wales raising devolution questions vis a vis Article 50. Mrs May made a mistake in not subjecting the Article 50 notice to Parliamentary approval. It was a political and judgmental mistake damaging Parliament's constitutional integrity. I personally need to be convinced it was a legal mistake.[41]

Patrick Birkinshaw, The Editor, 16 November 2016

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POSTSCRIPT

On January 24, 2017, the UK Supreme Court by 8-3 rejected the Government's appeal in *Miller* ([2017] UKSC 5). The ruling on the devolution points was unanimously in the Government's favour by 11-0. The next editorial will carry an analysis of the judgments and their implications.
The Editor, 25, January 2017.

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39 P. Birkinshaw & M. Varney, in *Britain Alone! The Implications and Consequences of UK Exit from the EU* (P. Birkinshaw & A. Biondi eds, Wolters Kluwer, 2016, ch 1 pp 13-37.

40 *Moohan* [2014] UKSC 67, paras 32–37; *Public Law Project* [2016] UKSC 39, para. 20; *Shindler* [2016] EWCA Civ 469, paras 48–50.

41 There is an argument that if the eventual agreement under Art. 50 on exit were not subject to ratification or if the UK were expelled without agreement then EU rights would be lost through the notice. Such a scenario would spell EU/UK disaster and would inevitably involve contravention of duties in Arts 3 and 4 TEU. *See* A. Young, *Constitutional Adjudication – Reality over Legality?*, U.K. Const. L. Blog (9 Nov. 2016), https://ukconstitutionallaw.org/2016/11/09/alison-young-r-miller-v-the-secretary-of-state-for-exiting-the-european-union-2016-ewhc-2768-admin-constitutional-adjudication-reality-over-legality/ (accessed 9 Jan. 2017).