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Miller, the Prerogative and Constitutional Change

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The Supreme Court's decision in January 2017 was a significant one in many respects covering much constitutional ground on prerogative powers, the effects of EU Membership on the UK constitution, the relationship between parliament and the devolved administrations, referendums in the UK and other issues besides. This contribution will focus on one of the two main issues in the judgment; that of the prerogative powers of the executive under the constitution and in particular their relationship to domestic EU legislation and the European Communities Act 1972 (ECA) in particular (the other main issue being the devolution questions).¹

It will provide a brief summary of the relevant rules regulating the prerogative considered in the case along with how they were applied by the UKSC, arguing that the contorted logic of the majority in the case in applying the common law rules regulating the exercise of the prerogative are evidence that they were not the real grounds upon which the case was decided. Rather, the substantive reasons for the majority finding that the government lacked the constitutional authority to give Art. 50 notification in the absence of statutory authority was the newly minted principle of major constitutional change by legislation, based on the unique circumstances surrounding the reception and effect of EU law on the UK constitution.

1. The rules regarding the Prerogative

¹ See Mullen, in this volume.

Prerogative powers are executive powers which do not owe their origin to legislation or the common law but are a legacy of the original powers of the monarch under medieval constitutional arrangements. Whereas they are commonly criticised for their seemingly undemocratic nature, the most important powers are now exercised by the government. The particular prerogative power at issue in *Miller* was the power to conduct foreign relations, in particular the power to sign treaties which, the UKSC found, also implied a power to withdraw from or terminate treaties.² Generally speaking such a power is exercisable without reference to legislation (because of the UK constitution's dualist approach to international law) and is not judicially reviewable.³

However, as with any prerogative power, the power to sign and withdraw from treaties could be affected both by statute and by common law rules. At issue in *Miller* was whether this power had been affected by EU-related legislation passed during the UK's EU membership and in particular the Act which gave effect to that membership in the first place; the ECA. In order to determine that issue, the Court had to apply the standard common law rules regulating the relationship between prerogative powers and statutes:

- Prerogative powers cannot be used to change the law
- Prerogative powers can be curtailed or restricted by statute
- Prerogative powers cannot be used to circumvent or frustrate the purposes of a statute.

Prerogative powers cannot be exercised to alter the law

² *Miller*, at [54].

³ *Miller*, at [55].

The idea that prerogative powers cannot be used to change the law dates back at least to the *Case of Proclamations* of 1610.⁴ The precise question at issue was whether the exercise of the prerogative of signing/withdrawing from treaties to give notification under Art. 50 TEU could be said to be changing the law in the relevant sense of the rule. There are two elements to this question: the first is practical ; the second relates to what counts as ‘law’ for the purposes of the rule.

The practical question concerns whether triggering Art. 50 in fact changes domestic law.⁵ On one reading, triggering Art. 50 itself does not change, repeal or affect the continued validity and operation of, for example, the ECA. It would remain in force and have full effect until it is either repealed, or the time limit in Art. 50 runs out depriving some of the rights granted by EU law of effect. This was the view taken by the minority who added that during the two year process, the executive will be accountable to parliament for its actions.⁶

The majority, by contrast, found that changes in the law which would eventually occur on the lapse of the time period in Art. 50 *could* be imputed to the exercise of the prerogative to effect notification of withdrawal under Art. 50. They endorsed a metaphor employed by the applicants, likening the triggering of Art. 50 to a bullet leaving a gun which will sooner or later hit a target once the trigger is pulled, which will result changes to current law as individuals will be deprived of certain EU-derived rights once the UK formally ceases to be a Member.⁷ As such, given the significant constitutional implications of leaving the EU in terms of the ‘switching off’ of a hitherto important source of law under the constitution, partly reflected

⁴ 12 Co Rep 74.

⁵ See C. Mac Amhlaigh, ‘Brexit’s Legal Stumble’, *European Futures*, 4 November 2016. Available at: <http://www.europeanfutures.ed.ac.uk/article-4371>

⁶ *Miller*, at [259].

⁷ *Miller*, at [36].

in the ECA's 'constitutional character',⁸ the Art. 50 notification could be seen as changing the law for the purpose of the common law rules regulating the prerogative.⁹

Both these positions, however, rested on the presumption that Art. 50 is not revocable. If it were revocable, this issue would have been much more complex, as the majority could not say with the same certainty that the mere act of notifying under Art. 50 would in fact result in changes in the law in the cutting off of EU law and EU-derived rights. However the Court proceeded on the basis that Art. 50 notification was not revocable,¹⁰ and neither party sought to argue otherwise.

The second aspect of this question relates to what counts as 'law' for the purposes of the rule. Perhaps the most significant aspect of the *Miller* judgment, and the issue which most clearly divided the majority from the minority, was the question of what impact EU membership had on the constitution and what status EU law had as a source of law. This issue became a *leitmotif* of the judgment. The majority accorded EU law a quasi-mythical status, arriving at a position which seemed almost to take the Court of Justice of the European Union's (CJEU) constitutionalising judgments at face value. As is well known, these judgments claimed a boot-strapped authority for EU law which did not rely on domestic implementing provisions for its authority and effectiveness and was supreme in cases of conflict with domestic law.¹¹ This position has been largely refuted by national courts (including the UKSC itself)¹² which asserted that EU law was valid and effective only by virtue of provisions of

⁸ *Miller*, at [67].

⁹ *Miller*, at [81], [83].

¹⁰ *Miller*, at [26].

¹¹ See C. Mac Amhlaigh, 'The European Union's Constitutional Mosaic: Big 'C' or Small 'c', Is that the Question?' in N. Walker, J. Shaw & S. Tierney, *Europe's Constitutional Mosaic*, (Hart, 2011).

¹² For example, in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 W.L.R. 324.

national constitutional law.¹³ This has given rise to a theorisation of the relationship between EU and domestic courts in terms of constitutional pluralism which posits EU law and state constitutional law as two autonomous legal systems which do not rely on each other for their validity.¹⁴ In *Miller*, the UKSC seemed to backtrack on this ‘pluralist’ view. It found that EU law constituted an ‘entirely new, independent and overriding source of *domestic law*’¹⁵ and that the CJEU was a ‘source of binding judicial decisions about its meaning.’¹⁶ The novelty in the majority’s position in *Miller* was not that it considered EU law an independent source of law (after all, it will clearly continue to exist post-Brexit) but that it considered it an independent source of *domestic law*, seemingly independent of any domestic implementing provisions such as the ECA. For the majority, then, notwithstanding ample rhetoric to the contrary in its reasoning,¹⁷ substantively it is UK withdrawal from the EU, rather than the repeal of the ECA, which would have the effect of changing the law. Given that this was an inevitable result of an Art. 50 notification, legislation was required to effect this change.

The minority, led by Lord Reed, took the more conventional pluralist view of EU law finding that the rule about changing the law related to domestic UK law only. Given that EU law was not an independent source of *domestic law*, but only had effects through the ECA, triggering Art. 50 would *not* change the law in the relevant sense as triggering Art. 50 would not change the ECA.¹⁸

¹³ A proposition which was given statutory footing in s. 18 of the European Union Act 2011.

¹⁴ See C. Mac Amhlaigh, ‘The Anatomy of Constitutional Pluralism in the European Union’ in G. Davies & M. Avbelj (eds.), *Research Handbook on Pluralism and EU Law* (Edward Elgar, forthcoming). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985303.

¹⁵ *Miller*, at [80].

¹⁶ *Ibid.*

¹⁷ *Miller*, at [62], [65], [67].

¹⁸ *Miller*, at [219].

Prerogative powers can be curtailed or abrogated by statute.

Where statutory provisions and prerogative powers cover the same subject matter, the statute will always prevail. The central case here is *De Keyser's Royal Hotel* where concurrent statutory and prerogative powers to commandeer property in wartime existed with different rules on compensation and the Court found that where concurrent regulation existed, the prerogative power could not be exercised, and the statutory power must be used.¹⁹

In *Miller* the issue effectively related to whether the ECA already envisaged withdrawal from the EU. If so, then the prerogative power to sign and withdraw from treaties in the EU context would be superseded by that statutory power. It was common ground that the ECA itself did not explicitly refer to a power to withdraw from the EU. The majority framed the question in terms of 'occupying the field'; *i.e.* where it could be said that the statute had 'occupied' the same 'field' as the prerogative power, then the statute would prevail. However the question of what, precisely, 'occupying the field' entails was not clarified by the majority. The issue was further complicated by the fact that the Court found that an express reference to the prerogative power for the purpose of the rule was not necessary. Prerogative powers could be curtailed by 'necessary implication'.²⁰

Whatever the relevant field was in the case, the majority seems to have simply assumed it had been occupied by the ECA. It held that had the power to withdraw from the EU survived the enactment of the ECA, this would have to have been positively created in an Act itself.²¹ However the majority's reasoning is not easy to follow here. Why should the creation of a new domestic source of law pursuant to the EU Treaties necessitate an express

¹⁹ *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508

²⁰ *Miller*, at [48].

²¹ *Miller*, at [86].

statutory power to withdraw from those Treaties? This approach seems to mis-apply the rule, which suggests that the prerogative exists until such time as it is restricted or curtailed by parliament; if it is not so curtailed or restricted, then the power continues to exist. The majority's approach seems to turn this logic on its head. Part of the justification for finding that the ECA had occupied the field of withdrawal was based on the rule in *ex parte Simms* that fundamental rights cannot be overridden by general words in a statute because Parliament must 'squarely confront what it is doing' in overriding rights.²² Accordingly, the majority could not accept that Parliament had 'squarely confronted' the notion that 'it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights'²³. However it came to this view by implying rather than arguing for the contention that the ECA had clearly occupied the field of withdrawing from the EU, mainly based on the unique status of EU law and the ECA. Reconstructing the majority's argument to fit the rule would entail the argument that the ECA introduced a significant new source of domestic law and that the relevant 'field' for the purposes of the application of this rule was the existence and continued effectiveness of this source of law - a field which necessarily encompassed the power to extinguish and render ineffective this source of law. Hence, as the majority concluded, s. 2 ECA 'does not envisage [EU law] rights changing as a result of ministers unilaterally deciding that the United Kingdom should withdraw from the EU Treaties.'²⁴ However this was not particularly clearly explained in the majority's opinion.

The minority's position on this question is clearer. Firstly, Lord Reed found that there was nothing in the ECA which suggested that Parliament intended to 'occupy' the field of

²² *Miller*, at [87].

²³ *Miller*, at [87].

²⁴ *Miller*, at [83].

withdrawal from the EU treaties. Whereas the ECA recognises the existence of Art. 50 TEU through the ratification of the Lisbon Treaty which introduced the provision, the ECA did not say anything about ‘how or by whom a decision to invoke article 50 should be taken’.²⁵ Furthermore, Lord Reed pointed to various instances where Parliament had expressly fettered the exercise of prerogative treaty-making powers in respect of the EU, such as the Parliamentary Elections Act 1978 and the European Union Amendment Act 2008.²⁶ The implication, according to the minority, was therefore that had parliament intended to restrict the exercise of the prerogative power to withdraw from the treaties in respect of withdrawing from the EU, it would have done so expressly.

Prerogative powers cannot frustrate the purpose of a statute by emptying it of content or preventing its effectual operation

The rule that prerogative powers cannot be used to frustrate the purpose of a statute is similar to the previous one and much of the analysis in the case overlapped. However, it is potentially broader than the restriction or curtailment rule in that even if a statute and a prerogative power don’t explicitly occupy the same field, any consequence of the exercise of a prerogative power which has the effect of frustrating the purpose of a statute could fall foul of the rule. For example, *Laker Airways* held that a prerogative power to amend an international treaty could not be exercised where its effect was to make the holding of a statutory licence useless.²⁷

Early in the judgment, the majority identified the purpose of the ECA as being to allow the UK to become a (now EU) member state. They contended that such a purpose could not

²⁵ *Miller*, at [233].

²⁶ *Miller*, at [206-7].

²⁷ *Laker Airways Ltd v Department of Trade* [1977] QB 643.

be reconciled with the existence of a prerogative power to make the UK cease to be an EU member.²⁸ This implied that the lack of a specific intention to withdraw from the EU in any subsequent EU-related legislation meant that all subsequent EU-related Acts were in harmony with this particular ‘constitutional’ purpose of the ECA,²⁹ even including the 2015 EU Referendum Act which paved the way for the Brexit referendum. Given that the Act did not specify what was to happen in the event of a leave vote, its purposes were limited to either the holding of a referendum, or was enveloped in the more general purposes of EU-related Acts and particularly the ECA namely to become and remain a member of the organisation.³⁰

The minority found that the rule restricting the exercise of prerogative from frustrating the will of Parliament was not entirely relevant here as the rule presupposed the existence of a prerogative power whereas the issue at stake in the *Miller* decision was whether such a power existed in the first place.³¹ Furthermore, the minority argued that the purposes of the 2015 Referendum Act could be interpreted as including the purpose of withdrawing from the EU such that the exercise of prerogative in this field would not frustrate its purposes.³²

2. EU law , the UK Constitution and the Principle of Constitutional Change by Legislation

Somewhat ironically, perhaps the most interesting aspect of the *Miller* judgment was the deliberation on the nature and status of EU law under the UK constitution, and the role of the

²⁸ *Miller*, at [88].

²⁹ *Miller*, at [108-109].

³⁰ *Miller*, at [119].

³¹ *Miller*, at [266].

³² *Miller*, at [267].

ECA in supporting that status; ironic because of all the uncertainties surrounding Brexit, perhaps the least uncertain thing is that the ECA itself will (probably) be repealed.

As is clear from the discussion above, in some ways the case was less about the prerogative and more about the constitutional status of the EU law and the ECA and the implications of changing this status. The majority's rather contorted reasoning on the application of the rules surrounding the prerogative seems to suggest a different basis for its conclusion. It was its emphasis on the significance of EU law and the ECA in the UK constitutional firmament, and the sheer scale of the constitutional change that Brexit involves, that led towards the majority espousing, *sotto voce*, a new principle that major constitutional change must be effected by legislation. The justification for this principle in its own terms, and finding that it existed in the constitution, is nebulous.³³ The majority relied on vague statements that the constitution 'recognised'³⁴ that major constitutional change could only happen through legislation, which was based on 'long-standing and fundamental principle'.³⁵ Nevertheless, this principle, threadbare as its details are, creates a much more logical and coherent justification for the majority's conclusion than the common rules regarding the prerogative and the relationship between prerogative and statute.

3. Conclusion

It is the unique status of the EU as a quasi-federal constitutional entity, its deep impact on the domestic constitutions of its member states, and the equally seismic changes resulting from withdrawal from membership, which best explains the inchoate and at times incoherent

³³ For a robust critique of both the origins of the principle and its potential application in the future see, Elliott, Mark, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' forthcoming (2017) Cambridge Law Journal.

³⁴ *Miller*, at [82]

³⁵ *Miller*, at [81].

reasoning of the majority in concluding that legislation was needed to commence the process of withdrawal. Whilst not quite on a par with other potential constitutional ruptures such as Scotland becoming independent, it certainly comes close. The shifts in constitutional politics over the past decade or so have left judges and commentators alike grasping to fill the gaps in the UK's constitutional architecture. In very British fashion, these holes are covered as and when they arise. This reputed flexibility was also evident in the *Miller* decision. Whilst the majority judgment can be faulted on a number of counts, not least for seeming to pull a constitutional principle out of a hat, perhaps in the broader scheme of things it could be said to be in line with the generally pragmatic approach to constitutional development in the UK. During these turbulent constitutional times, the constitution works overtime to ensure that change occurs in ways which respect the fundamental normative principles which underpin it, even if this involves sleights of hand such as the development of a new principles that major constitutional change requires statutory authorisation.