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Law and Politics in the Supreme Court

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By a majority of 8 to 3, the Supreme Court held that in light of the terms and effect of the European Communities Act 1972, 'the prerogative could not be invoked by ministers to justify giving Notice under Article 50... Ministers require the authority of primary legislation before they can take that course' (para. 101). Within hours, the European Union (Notification of Withdrawal) Bill,¹ authorising the Prime Minister to trigger Article 50, was published. It passed through the House of Commons unscathed yesterday. A White Paper, setting out the Government's plan for Brexit, such as it is, has also been published.²

The purpose of this post is very specific. My aim is not to analyse the judgment, the Bill or the White Paper. That has been done elsewhere. Instead, my aim is to begin to explore the relationship between law and politics, and between Parliament, the executive and the judiciary, taking as a starting point the judgments in the Supreme Court. The judges are, at times, careful not to trespass into the political realm. Nevertheless, their findings are informed and influenced, in a number of ways, by the political context. There are, moreover, important differences between the approaches adopted by the majority and the minority, including differences relating to the judges' understanding of the legal process of Brexit. It is hoped that inconsistencies between and within the judgments will provoke further academic consideration of the extent to which Courts should intrude into, or take cognisance of, the political realm; and of the extent to which constitutional safeguards are matters of substance or form. But, at this febrile political time, the clearest conclusion is that by failing to answer key questions of law, the Court has done a disservice to Parliament, thereby contributing, not towards the provision of a clear framework within which politicians are able to address the realities of Brexit, but to the pervasive sense of confusion.

The majority in the Supreme Court upheld the principle that major changes to the UK's constitutional arrangements, such as would result from withdrawal from the EU, require Parliamentary legislation. They identified the decision to trigger Article 50 as the key constitutional moment; and held that Parliamentary involvement was accordingly needed at that stage. The Court rejected the argument that ministers might have the power to trigger Article 50, absent Parliamentary authorisation, on the grounds that, once Article 50 is triggered, the role of Parliament would be pre-empted; the die would already be cast (paras 92 and 94). Nevertheless, the Court stated that the form that legislation on the triggering of Article 50 should take 'is entirely a matter for Parliament'. It chose to add that 'the fact that Parliament may decide to content itself with a very brief statute is nothing to the point' (para. 122). This is an orthodox, rather formalistic, position;

¹ See http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0132/cbill_2016-20170132_en_2.htm#l1g1.

² See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf/.

which affirms the sovereignty of Parliament as the key principle of the UK's unwritten constitution, and which acknowledges that there is a clear separation between law and politics.

The approach of the dissenting judges was rather different. Their argument was that the exercise of what they see as the prerogative power to trigger Article 50, would not render the role of Parliament merely nugatory. Lord Reed stated that 'Parliament retains full competence to legislate so as to protect rights before withdrawal occurs' (para. 218). And, equally importantly, he found that 'controls over the exercise of ministerial powers under the British constitution are not solely, or even primarily, of a legal character' (para. 240). Thus, the legitimacy of the Brexit process is not dependent on Parliamentary authorisation of the Prime Minister's decision to trigger Article 50, but on subsequent legal (via the passage of legislation) and political (via scrutiny of the Executive as the negotiations unfold) oversight. According to Lord Carnwath, 'whatever the shape of the ultimate agreement, or even in default of agreement, there is no suggestion by the Secretary of State that the process can be completed without primary legislation in some form' (para. 259). Thus, 'talk of frustrating or pre-empting the will of Parliament would be wide of the mark' (para. 267). But, notwithstanding the constitutional significance he attached to Parliamentary scrutiny of the Executive, he warned that 'it is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary' (para. 240). Thus, both sides attempt to delineate a line beyond which they, as judges, should not trespass; but at the same time, both refer, and place emphasis on, the political implications of, and context surrounding, the judgment.³

A House of Commons Briefing Paper, published on 27 January 2017, set out the ways in which Parliament will be able to scrutinise the government's Brexit plans in the months ahead.⁴ The Briefing Paper does not distinguish sharply between the passage of primary legislation, and mechanisms for holding the government to account. Instead, the focus is on the substance, rather than the form, of Parliamentary involvement. The briefing paper raises a number of doubts concerning the likely robustness of Parliamentary scrutiny; many of which are products of the enduring legal uncertainties surrounding the process of withdrawal.

The biggest shortcoming of the judgment is that it did not address the revocability of Article 50, when it had the discretion – possibly even the obligation – to refer that question of interpretation of EU law to the Court of Justice.⁵ The Supreme Court was content to proceed on the basis that 'it is common ground' that notice once given, cannot be withdrawn (para. 26). The majority referred to 'the Secretary of State's case that, even if this common ground is mistaken, it would make no

³ Similar points can be made in relation to the discussion in the Supreme Court about the impact of the referendum, and the operation of the Sewel Convention in relation to the role of the devolved assemblies; they are not addressed further in this post.

⁴ See <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7884>.

⁵ See <http://www.howtocrackanut.com/blog/2017/1/24/uk-supreme-court-miller-judgment-seeks-to-reassert-parliamentary-sovereignty-but-it-does-so-in-breach-of-eu-law-and-in-disservice-to-the-uk-parliament>, and <https://eutopialaw.com/2016/11/07/the-miller-judgment-why-the-government-should-argue-that-article-50-is-reversible/>. For a full analysis of the arguments on revocability, see <https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/>, <https://ukconstitutionallaw.org/2016/11/29/stijn-smismans-about-the-revocability-of-withdrawal-why-the-eu-law-interpretation-of-article-50-matters/> and <https://eutopialaw.com/2016/12/09/to-refer-or-not-to-refer-that-is-the-question/>.

difference to the outcome of these proceedings' (ibid); while Lord Reed stated that, 'even if the process might be stopped, it is common ground that Ministers' power to give notice under article 50(2) has to be tested on the basis that it may not be stopped' (para. 169).

But, plainly, the legal and political – indeed constitutional – significance of the Article 50 notification (and of the Bill authorising the Prime Minister to notify the UK's intention to withdraw from the EU), depends in large part on the extent to which it, to borrow from the language of the majority, pre-empted future choices. It depends in large part on whether Lord Pannick's claim that once the Article 50 trigger is pulled, the bullet will inexorably hit the target, can be sustained.⁶ Only if Article 50 is irrevocable, it is correct to identify the decision to trigger Article 50 as the key constitutional moment.

In the course of this week's debate in Parliament on the European Union (Notification of Withdrawal) Bill, the government made a 'concession' to MPs, offering them a vote on whether to accept the government's Brexit deal. The key constitutional question is whether this later vote will be meaningful, or whether the die will have been cast.⁷ For some, like Labour's Shadow Brexit Secretary Keir Starmer, the promise of a Parliamentary vote amounted to 'a huge and significant concession'. Others, like Caroline Lucas, co-leader of the Green Party, took the opposite view: 'the vote they're offering, which will give MPs a choice between an extreme Brexit and falling off a cliff edge into World Trade Organisation rules, isn't a concession, it's an ultimatum'. These differences of opinion, and of approach, are significant. One might feel that they lie in the political rather than the legal realm. But they reflect the concerns expressed in the Supreme Court, and speak directly to the extent to which the role of Parliament might be pre-empted by that stage in the withdrawal process.

A further significant shortcoming of the judgment is that it did not pay sufficient attention to the fact that the withdrawal deal depends not only on endorsement by the UK Parliament, but also, as the Commons Briefing Paper recognises, on the agreement of the EU Council and the European Parliament (and possibly the continuing Member States in their own right).⁸ The government's Brexit deal might be endorsed in Parliament but still be rejected by the EU. In such circumstances, and on the understanding that the Article 50 notice is irrevocable, the UK's withdrawal from the EU, will not (contrary to the understanding of Lord Carnwath) be governed by legislation. Should the withdrawal deal be rejected by the EU side (and provided that the time limit is not extended), the UK will simply leave the EU without any deal.

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The relationship between law and politics is, of course, a difficult one. A post such as this can do no more than scratch the surface; hopefully prompting further, more detailed, engagement with these

⁶ Compare Lord Carnwath's rejection of the trigger/bullet analogy, at para. 262: 'A real bullet does not take two years to reach its target. Nor is its progress accompanied by an intense period of negotiations over the form of protection that should be available to the victim by the time it arrives'.

⁷ If it is accepted that the giving of notice is irrevocable, once the notice is given, Parliament will, as the House of Commons' Briefing Paper puts it at p.36, be effectively committed to one of the following: 'approving the final Brexit agreement; seeking a renegotiation of the agreement reached by the Government (if practicable – the consent of all other EU Member States would be needed to extend the negotiation period beyond two years, and there is no guarantee that the UK Parliament would endorse an amended agreement); or leaving the EU without any agreement'.

⁸ Ibid, p.32.

themes. There are inconsistencies within each of the judgments, and important differences between them, in particular in relation to the constitutional significance of scrutiny of the Executive. It seems to me that the key demand which we should have of the law is that it should aim to provide a robust framework within which meaningful political contestation can occur. It is, therefore, a cause of huge regret that we still do not know whether A50 is reversible; or what the consequences of any withdrawal deal being rejected, not by Parliament but by the EU, are. Given their direct bearing on the points of contestation between the majority and the minority in the Supreme Court, it is to be regretted that the Court chose not to answer these questions, or to refer them to the European Court. It may be that the legal answers emerge, either as a result of separate litigation, or when the European Council issues the guidelines referred to in Article 50(2), in the light of which the negotiations will proceed. If and when legal answers emerge, they will have a profound bearing on the process of the Brexit, sharpening the respective roles of Parliament and the Executive. But, it appears that clarity in relation to the interpretation of Article 50 will come too late to have an impact on what the majority identifies as the key constitutional moment. The Supreme Court judgment therefore represents an opportunity lost.