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Supreme Court's Decision on Brexit

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Editorial note: Given the high level of interest in our posts which address Brexit, the following detailed analysis of the Supreme Court's decision on the Brexit process by Maria Kendrick, Visiting Lecturer and PhD candidate at King's College London, may be of interest to our readers.

The judgment of the Supreme Court handed down on 24 January 2017 by a majority of 8-3, can be summarised thus: a statute enacted by the Westminster Parliament is required to authorise the decision to withdraw from the EU, and therefore the giving of Notice under Article 50 (2) TEU. Lord Hughes (dissenting) provides an irresistibly succinct explanation as to the tensions underlying the case and, in my opinion, the reason why it was a majority, rather than a unanimous decision on the issue of the giving of Notice: 'the main question centres on two very well understood constitutional rules, which in this case apparently point in opposite directions. They are these: **Rule 1** the executive (government) cannot change law made by Act of Parliament, nor the common law; and **Rule 2** the making and unmaking of treaties is a matter of foreign relations within the competence of the government' [1] (emphasis original). The opposing premises adopted by the majority and dissents as to the application of these two rules goes to the essence of the disagreement between them. Although I consider that the actual decision is correct, in that Parliament through legislation, not the Executive through use of the prerogative, is what the UK constitution requires in order to give Notice under Article 50(2), the reasons behind both the majority and the dissent can be criticised. It is the intention of this post to explain how.

The essence of the majority view is that EU law is actually a source of UK domestic law and consequently can only be changed by Act of Parliament. The majority explains that 'the EU treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form. It follows that, rather than the Secretary of State [for Exiting the European Union] being able to rely on the absence in the 1972 [European Communities] 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'. [2] I will make one noteworthy observation at this point, which is that this statement by the majority is commendable for its honesty as to the importance of EU law within the UK constitution. The importance of EU law has long been subdued and talked down in comments made by some corners of the judiciary and academia.

The essence of the dissent is closely linked to the application of Lord Hughes' 'Rule 2' categorisation. It considers the issue to be one of statutory construction of the European Communities Act 1972 (ECA), being the incorporating Act providing for EU law obligations to be incorporated into UK law, even if there are no such obligations. Lord Reed explains '[u]nder the arrangements established by the [European Communities] Act, alterations in the UK's obligations under the Treaties are automatically reflected in alterations in domestic law. That is equally the position whether the alterations in the UK's obligations under the Treaties result from the Treaties' ceasing to apply to the UK, in accordance with article 50, or from changes to the Treaties or to legislation made under the Treaties. The [European Communities] Act simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties, whatever they may be. … If the Treaties do not apply to the UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK'. [3] The dissent's view that the ECA reflects in UK law whatever its international obligations deriving from the EU Treaties are, even if withdrawal means that there aren't any, is based on what I will summarise as two arguments. First, is an analogy with the UK's accession to the then European Community in the 1970s, and second, Lord Reed's insinuation [4] that Parliament has already given approval in the form of a statute i.e. the ECA as amended in 2008 to incorporate the Treaty of Lisbon, in which is contained Article 50(2), into UK law. The second argument can be dealt with swiftly in that, as the majority states, there would have needed to have been more than the usual incorporation of the Treaty of Lisbon through the 2008 Act if this implied Parliamentary intention is to be acceptable. The first argument, however, does not take into account the fact that entering into Treaties and withdrawing from Treaties, which contain principles like direct effect, after forty years of influence from a supranational entity is not practically the same thing. The legal and factual circumstances of 1972/3 and 2017 are not a direct comparison. In practice, the consequences will be and are different. Suggesting, as Lord Reed appears to do, that because the ECA 1972 was enacted before ratification by the UK of the EC Treaties in the 1970s the reverse can now occur, seems to compare two incomparable situations.

In considering the correctness of who should give Notice under Article 50(2) in accordance with the UK's constitutional arrangements, the only consistency that is apparent from the judgment is that it is not clear what the UK's constitution requires. With two such well-established rules, as set out by Lord Hughes, it is surprising that eleven of the UK's most senior judges cannot agree on the result of their application in this case. The reason for this, I humbly and respectfully submit, stems from the premises adopted by both the majority and the dissent. One needs to appreciate what EU law is and what its influence on UK law is. This involves considering the Treaties from an EU perspective and concurrently acknowledging the uniqueness of EU law's place in the UK's constitution, from a UK perspective. Contrary to the dissent, the EU Treaties are not just another collection of international Treaties, and so withdrawal is not another foreign relations exercise for which use of the royal prerogative is appropriate. Furthermore, EU law is not a body of law 'grafted' [5] on, as the majority suggest, as if with a removable adhesive to become something akin to a distinct detachable source of domestic law. Rather, in reasoning why there should be Parliamentary authorisation to give Notice under Article 50(2), one needs to adopt the perspective which acknowledges EU Law's pervasive influence on UK law beyond the scope of that enacted by the EU institutions. Direct effect, as I pointed out in my last blog post on the Divisional Court's judgment in this case, is one element which explains why EU law is different from any other international Treaty. There is also an additional point which does not seem to have been considered in the judgment, or at least not sufficiently, which is the influence of EU legal principles on the

body of UK law. These principles may have had their genesis in the Treaties and the legislative and administrative acts of the EU institutions, which the UK has been obliged to implement and comply with, but are not strictly contained to circumstances where these instruments are applied. There are areas of domestic law proper, not contingent on EU membership in the manner suggested by Lord Reed, which are influenced by EU principles, sometimes but not necessarily with explicit reference to EU law and/or drafted with respect to EU law competences. The pervasive influence of EU principles was persuasively identified by Patrick Birkinshaw and Mike Varney in 2016.[6] As I said in my previous blog post, the ECA is not just an incorporating statute and EU law is not like any other international law treaty. When dealing with a pervasive source of supranational influence, the UK's constitution requires Parliamentary not just Executive authorisation for any action which runs contrary to that influence.

When to Pull the Trigger?

As a slight adjunct to the reasoning of the dissent given by Lord Reed (with which the other two dissenting judges agreed), Lord Carnwath repeated the rule from the Tin Council case [7] that 'the prerogative does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament' [8] and concluded that 'Service of an article 50(2) notice will not, and does not purport to, change any laws or affect any rights. It is merely the start of an essentially political process of negotiation and decision-making within the framework of that article. True it is that it is intended to lead in due course to the removal of EU law as a source of rights and obligations in domestic law'. It may have been more constitutionally satisfactory to have seen the division in the judgments be between the discussion as to whether the giving of notice is really the point at which domestic law starts to witness a change. The fact that the judges were content to decide the case based on an agreement between the parties that they can proceed on the basis that Notice given under Article 50 is irrevocable, without actually deciding the issue, does not assist here. In his submissions, Lord Pannick drew an analogy with a gun, once the trigger is pulled it will reach its target, the giving of Notice being like pulling the trigger, which for the majority signals the need for legislative change. [9] Even if this analogy did not convince Lord Carnwath, the change will start somewhere and in the interests of legal certainty this needs to be identified. The date on which Notice is given under Article 50 (2) provides a signal that change will soon follow and that there is a clear intention to achieve change, in whatever form, to the influence of EU law on the UK's legal and constitutional arrangements, and so is as good a time as any.

One area where the judges were able to give a unanimous judgment was on the question of the role of the devolved institutions. While the respective positions of Scotland, Wales and Northern Ireland vary in the exact way that the role of EU competences is provided for in their respective devolved settlements, because the details of the legislation providing for each of the devolved settlements differs, [10] it was correctly identified that the Sewel Convention is applicable to them all. [11] However, the judges considered that the convention, despite its recognition in statutory form in s2 of the Scotland Act 2016, was precisely that, a political convention that may create political expectations on the part of the devolved institutions but not legal rights to participation in the Brexit process enforceable in the courts. [12] According to the majority, legislation is required, but not from the devolved legislatures, rather from the Westminster Parliament. This may have stymied legal challenges brought by the devolved institutions, but in terms of their political efforts

to influence Brexit, the trigger on the starting pistol has most certainly been pulled.

Conclusion – Parliament's Sovereignty

Although the judicial opinion in the Supreme Court differed with regard to what the UK's constitutional requirements are in order that Notice be given to withdraw its membership of the European Union, one notable aspect of the judgment was its welcome clarity as to the principle of Parliamentary sovereignty. It was not that long ago that members of the judicial body of the House of Lords in the infamous *Jackson* case [13] questioned the principle of Parliamentary sovereignty, its role in the UK constitution and Dicey's account of it. It was interesting to see a majority judgment reassert so unequivocally that it is a fundamental principle of the UK constitution. This, at least, is to be welcomed.

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