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SYMPOSIUM ON TREATY EXIT AT THE INTERFACE OF DOMESTIC AND INTERNATIONAL LAW

BREXIT, *MILLER*, AND THE REGULATION OF TREATY WITHDRAWAL: ONE STEP FORWARD, TWO STEPS BACK?

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In "the constitutional case of the century," the U.K. Supreme Court concluded that the Government did not possess the prerogative power to withdraw from the European Union.[1] However, while it may be clear from the decision that legislation was required to empower the Government to notify the European Union of its intention to leave, the scope of the Court's reasoning in *Miller* is otherwise uncertain.[2] At its broadest, the decision would apply to the withdrawal from any treaty that had created rights for individuals, regardless of whether such a treaty had been implemented into domestic law or not. At its narrowest, it only applies to the EU Treaties, which created a set of arrangements in international law that are so esoteric, they are unique to the European Union. To demonstrate how one judgment can generate such a range of interpretations, this essay unravels the different strands of argument running through the decision and considers the criticisms leveled by scholars. It will argue that whether U.K. law requires legislation to withdraw from a treaty depends upon the extent to which that treaty creates rights in domestic law, the constitutional importance of the legislation incorporating the treaty into U.K. law, and the circumstances in which a legal challenge to the use of the prerogative arises. *Miller* provides no general answer, merely a series of questions.

A Tale of Two Spheres

The U.K. government enjoys a broad prerogative power of foreign affairs. As *Miller* confirmed, this includes the power to enter into and withdraw from international treaties.[3] However, this does not grant the executive *carte blanche* to exercise its power free from legal oversight. All prerogative powers are limited by common law and by legislation. In particular, "it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative does not enable ministers to change statute law or common law."[4] Moreover,

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[1] R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [2017] 2 WLR 583.

[2] There is also considerable controversy as to whether the Supreme Court reached the right conclusion. *See, e.g.*, Richard Ekins, *Constitutional Practice and Principle in the Article 50 Litigation*, 133 Law Q. Rev. 347 (2017); David Feldman, *Pulling a Trigger or Starting a Journey? Brexit in the Supreme Court*, 76 Cambridge L.J. 217 (2017); Mark Elliott, *The Supreme Court's Judgment in* Miller*: In Search of Constitutional Principle*, 76 Cambridge L.J. 257 (2017).

[3] *Miller*, [2017] UKSC at 54.

[4] *Id.* at 50.

"ministers cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation."[5]

As withdrawal from the EU Treaties would alter the law, frustrate the purpose of the European Communities Act of 1972, and remove private rights incorporated into domestic law,[6] the prerogative power to withdraw from treaties did not include the power to withdraw from the European Union. Such a prerogative power would only exist if there were clear indications in the 1972 Act that the executive retained the prerogative power to withdraw from the European Union, even though doing so would alter domestic rights. However, the Act could not be interpreted in this manner.[7] Moreover, the Supreme Court recognized that withdrawing from the European Union would give rise to a "fundamental legal change," amounting to a loss of a source of law.[8] Such a "major change to UK constitutional arrangements cannot be achieved by ministers alone; it must be effected in the only way that the UK constitution recognizes, namely by Parliamentary legislation."[9]

It is important to recognize that the decision in *Miller* was by no means clear cut. The United Kingdom follows a dualist approach to international law. While the U.K. executive can exercise prerogative powers to enter into and withdraw from international law obligations, these obligations do not create rights and obligations in domestic law unless and until they are incorporated into domestic law through legislation. This dualism is mirrored by a separation of powers between the executive and the legislature. As John Finnis argued in a lecture that criticized the reasoning that was later adopted by the majority in *Miller*, this means that general restrictions on prerogative powers do not apply to the prerogative power of foreign affairs.[10] The rights and obligations incorporated into U.K. law through the European Communities Act 1972 were not statutory rights. Rather, they were conditional on an exercise of the prerogative power. This interpretation was reinforced by the wording of the Act, which incorporates such rights, liabilities, and obligations as arise "from time to time."[11] Consequently, no domestic rights are removed by the withdrawal from the European Union. Nor is the 1972 Act frustrated. Rather, it continues to serve its purpose of ensuring that the United Kingdom adheres to its international obligations, which, following withdrawal from the European Union, have been modified. This argument was accepted by the minority in the Supreme Court. How did the majority reach the opposite conclusion and what are the broader consequences for the restrictions on the prerogative power to withdraw from international treaties?

Dualism Disputed?

The most expansive interpretation would be to argue that, even if not specifically expressed in such terms, *Miller* can be best understood as an indirect challenge to dualism. Eirik Bjørge argues that the version of dualism presented above is not a fully accurate account of U.K. law.[12] In particular, he argues that earlier case law supports the claim that unincorporated treaty rights can override provisions of the common law that appear to remove those rights. Moreover, dualism is not just required by parliamentary sovereignty, but is also concerned with the protection of individual liberty. Bjørge is careful to point out that there is neither a general principle that unincorporated

[5] *Id.* at 51.

[6] *Id.* at 72–73 and 83.

[7] *Id.* at 88.

[8] *Id.* at 82.

[9] *Id.*

[10] John Finnis, Brexit *and the Balance of Our Constitution* (Sir Thomas More Lecture, Dec. 1, 2016).

[11] European Communities Act 1972, c. 68 § 2(2) (U.K.).

[12] Eirik Bjørge, *Can Unincorporated Treaty Obligations be Part of English Law?*, 2017 PUB. L. 571.

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treaties that protect individual rights will override domestic law, nor a general principle that treaties have no effect in English law unless and until they are incorporated.

This essay is not the place to analyze Bjørge's reassessment of dualism. Moreover, it is clear, as Bjørge recognizes, that *Miller* does not provide any specific authority for this claim. The majority judgment in *Miller* contains a clear account of dualism, recognizing that, while treaties have effect in international law, this effect is not mirrored in domestic law. Treaties "are not part of UK law and give rise to no legal rights or obligations in domestic law."[13] Legislation is required to incorporated treaties into English law.[14] Moreover, this principle is based on parliamentary sovereignty, not on the protection of individual liberties.[15] The need to preserve parliamentary sovereignty is also illustrated through the development of the Ponsonby Convention, now placed on a statutory basis,[16] requiring most treaties to be laid before Parliament prior to ratification, allowing for parliamentary oversight. Even more democratic oversight occurs prior to the ratification of some modifications to the EU Treaties under the provisions of the European Union Act 2011. In short, it is hard to read *Miller* as anything other than a classic account of dualism. Moreover, even if dualism is rejected or narrowed in the manner suggested by Bjørge, courts would still need to interpret each treaty to determine its impact on individual rights in order to assess whether the executive could withdraw from the treaty by use of the prerogative alone.

What the Prerogative Giveth … the Prerogative Cannot (Normally) Taketh Away

A somewhat narrower interpretation of *Miller* recognizes that there is a distinction between using a prerogative to enter into a treaty, and using it to withdraw from a treaty once legislation has incorporated its provisions into domestic law. Parliamentary sovereignty allows the executive to enter into treaties because they have no impact on domestic law. Once incorporated, however, the argument changes. For the executive to withdraw from a treaty once its rights and obligations have been incorporated into domestic law has a different impact. It could remove rights and obligations that Parliament had chosen to incorporate into domestic law—an executive act overriding the will of the legislature. The executive could withdraw from a treaty if it were possible for these rights and obligations to continue to be protected in domestic law as domestic rights following withdrawal. Similarly, if legislation included a sunset provision that specified that the legislation would terminate following withdrawal, the executive could use the prerogative to withdraw from a treaty. The legislature, by implication, has overridden the general limit on the prerogative power that it cannot be used to alter domestic law. Moreover, the legislature's will is not frustrated. The sunset clause expresses the legislature's will that the rights and obligations the legislation incorporates are conditional on an exercise of prerogative powers by the executive to enter into and withdraw from treaty obligations.

There is no clear endorsement in *Miller* of the principle that the executive cannot leave incorporated treaties without parliamentary approval. Moreover, to the extent that it is implicitly recognized, it is difficult to discern whether the same conclusion would be reached for all treaties that have incorporated rights or obligations into domestic law, or whether this would only apply to some treaties, or whether the real driving force is the wording of the legislation used to incorporate treaty obligations into domestic law. The majority in *Miller* recognized that the European Communities Act 1972 had been used to incorporate a range of rights and obligations into U.K. law.[17] Although the Supreme Court did not focus on the removal of rights to the same extent as the Divisional Court, it

[13] *Miller*, [2017] UKSC at 55.

[14] *Id.* at 56.

[15] *Id.* at 57.

[16] Constitutional Reform and Governance Act 2010, c. 25 § 20 (U.K.).

[17] *Miller*, [2017] UKSC at 62 and 69–72.

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nevertheless endorsed the approach of the Divisional Court and stated that the removal of rights that would occur following withdrawal from the European Union would have provided an additional justification for the need for legislation.[18] This approach also helps to explain the statement of the majority that "[t]here is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union."[19] While the former would have received either direct or indirect democratic support from the legislature and would modify the content of rights, the latter removes all rights and obligations that had, until the act of the executive, been approved for incorporation into domestic law by the legislature. This reading would also fit with the focus in *Miller* on the protection of parliamentary sovereignty, its approach to dualism, and with broader approaches in U.K. public law that recognize a difference between granting and removing a right.

However, it is also important to recognize the role that the wording of the European Communities Act 1972 played in the *Miller* decision, in addition to the *sui generis* nature of the European Union. The next section will examine the latter of these two issues. As regards the former, great attention was paid to the ambulatory nature of the Act, which does not incorporate a specified list of rights and obligations. Rather, it incorporates rights and obligations "from time to time provided for by or under the Treaties."[20] It was this wording that dominated the argument of the Government and the conclusion of the minority, and which has so influenced the academic criticism of the judgment. The wording was used to argue that the rights and obligations incorporated into U.K. law were different. Their content was dependent on the U.K.'s membership of the European Union, itself dependent on the exercise of a prerogative power. These were read as a means of accommodating the variable content of EU law as this varied over time, ensuring the United Kingdom could comply with its obligations arising from EU membership whilst retaining its dualist approach to international law.[21] While the majority agreed with this interpretation as regards the modification of rights through EU Treaty changes, it did not accept the same argument applied when the prerogative was used to withdraw from the Treaty.

How far can this reasoning be applied to other treaties? Take, for example, the European Convention on Human Rights (ECHR), whose domestic incorporation occurs through the provisions of the Human Rights Act 1998. The Act requires courts to read and give effect to legislation, so far as it is possible to do so, in a manner compatible with Convention rights.[22] It also establishes that it is unlawful for a public authority to act in a manner that contravenes a Convention right.[23] Convention rights are defined in Section 1 of the Act, with Schedule 1 setting out the specific rights.[24] Unlike the position with the European Union, the incorporation of Convention rights into domestic law was not required for the United Kingdom to fulfill its international law obligations under the ECHR. The Act also contains an ambulatory provision, defining the Convention "as it has effect for the time being" in relation to the United Kingdom.[25]

The different means of incorporating Convention rights and the lack of a specific international law obligation to incorporate such rights into domestic law might mean that, were the executive to use its prerogative powers to withdraw from the European Union, it would remove domestic rights and frustrate the Act. According to this

[18] *Id.* at 83–84.

[19] *Id.* at 78.

[20] European Communities Act 1972, c. 68 § 2(2) (U.K.).

[21] *Miller*, [2017] UKSC at 79.

[22] Human Rights Act 1998, c. 42 § 3 (U.K.).

[23] *Id.* at § 6.

[24] *Id.* at schedule 1.

[25] *Id.* at § 21.

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view, Convention rights would not be understood as dependent upon an exercise of the prerogative. Alternatively, the definition of Convention rights as those binding the United Kingdom "as it has effect for the time being" might mean that Convention rights should be understood as conditional upon the exercise of a prerogative power. Is the purpose of the Human Rights Act emptied, its purpose being to uphold international obligations the United Kingdom no longer has, or does the Act provide a domestic protection of Convention rights that would carry on even after withdrawal from the ECHR?[26]

Esoterically Unique European Union

A further argument influencing the majority was the unique nature of the European Union and of EU law. It is hard to deny that the European Union differs from other international organizations. As *Miller* recognizes, the United Kingdom accepted, through the enactment of the 1972 Act as interpreted through later case law, that domestic law which contradicts directly effective provisions of EU law can be "disapplied."[27] *Miller* also recognized EU law as a new source of law, its provisions incorporated into U.K. law through the conduit pipe of the 1972 Act.[28] The EU Treaties and their means of implementation into U.K. law "were and are unique in their legislative and constitutional implications."[29] They grafted directly effective EU law "onto and above"[30] domestic law and, as such, "it seems most improbable that those two parties 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."[31]

These statements raise more questions than they answer. Is the "major change" to the U.K. Constitution the removal of a source of law, the removal of a source of law that can disapply domestic law, or the removal of so many rights and obligations in one go? Is it because of the "constitutional nature" of the European Communities Act 1972?[32] If so, does this mean that treaties such as the ECHR or the Belfast Agreement cannot be removed by the prerogative alone given their constitutional importance? Or is this not the case for the Belfast Agreement, which is not specifically designed to create individual rights? Or is neither of those treaties of sufficient constitutional importance, given that these treaties do not provide for the creation of a new source of law, let alone one that can displace domestic law?

Conclusion

Miller may be understood as a straightforward answer to a simple question: legislation is needed to withdraw from the European Union. However, the different strands of reasoning that intertwine through the judgment mean that it is very difficult to predict the extent to which future treaty withdrawals may be achieved through an exercise of prerogative power by the executive without legislative authority. To add to the complexities, we

[26] *See* Alex Peplow, *Withdrawal from the ECHR After Miller—A Matter of Prerogative?*, U.K. Const. L. Blog (Feb. 28, 2017); Jack Williams, *Miller and the Human Rights Act 1998: Can the Government Withdraw the UK from the ECHR by the Royal Prerogative?*, Pub. Sector Blog (Feb. 28, 2017); and Gavin Phillipson & Alison L. Young, *Would Use of the Prerogative to Denounce the ECHR "Frustrate" the Human Rights Act? Lessons from Miller*, 2017 Pub. L. 150.

[27] *Miller*, [2017] UKSC at (Brexit Special Extra Edition) 60–61.

[28] *Id.* at 80–81.

[29] *Id.* at 90.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 67.

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also need to be acutely aware of the context in which the *Miller* case was decided. The applicant was challenging a position taken by the Government on how it would leave the European Union in the future, rather than challenging a specific use of the prerogative. Article 50 triggers withdrawal, but it is not clear what rights will be lost, this being dependent upon negotiations on the withdrawal agreement. Nor was it clear at that time how far Parliament would have a say in future negotiations or the modifications to domestic law that would then ensue. The Supreme Court's decision is more akin to abstract constitutional review. This may explain the lack of certainty. It may also emphasize a deeper point. Context—particularly constitutional—is everything.

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