With Article 50 now triggered, and the ‘Great Repeal Bill’ White Paper published, was there ever such an agitated time for the British Constitution?

Nine months – comparisons with human gestation have been noted – from the June referendum vote to leave the EU, until 29 March 2017, the date on which the UK formally delivered its letter of withdrawal to the EU – is a long time in Brexitland.

The legal complexities of the Miller case already seem distant as I write this in the last week of March. This has been the busiest of times, both for Britain’s relationship with the EU, and for Britain’s intra-governmental affairs. For example, last Monday, Theresa May and Nicola Sturgeon met to discuss their differences, and on Tuesday, the Scottish Parliament voted in favour of a new independence referendum. On Wednesday, the UK’s Article 50 notification letter was finally delivered into the hands of Donald Tusk, a heartbreaking event or jubilant day – depending on your point of view – but in any case, a momentous day for British law and history. On Thursday, the UK government published its ‘Great Repeal Bill’ White Paper, foreseeing one of the most complex and challenging legislative initiatives in the UK’s legal history, and by the end of the week, the EU had published its own draft Brexit guidelines. Was there ever such an agitated time for the British Constitution?

Brexit has revealed the truly unsettled nature of the British Constitution. Almost every aspect of Constitutional law has been raised in this process. What do we mean by ‘sovereignty’ and has it been curtailed by Britain’s relationship with the EU? Has the notion of ‘popular sovereignty’ (as exercised in a referendum) come to replace that of ‘parliamentary sovereignty’? What is the extent of executive prerogative power, and when must it be
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constrained by Parliament, as in the need for parliamentary authorization to trigger Article 50 EU Treaty? To what extent can executive powers, in the form of ‘Henry VIII’ clauses, be employed in the repatriation of EU law in a ‘Great Repeal Bill’? What powers do the devolved nations have in the Brexit process, in a constitutional system that still proclaims the Union, but is no longer unitary?

**Miller: A Constitutional Landmark**

These, and many other constitutional questions, arise in the context of Brexit, and many were debated in a *Modern Law Review* symposium on the *Miller* litigation. In the landmark decision *Miller v Secretary of State for Exiting the EU*, the UK Supreme Court ruled that the government cannot use the royal prerogative to trigger Article 50, and so leave the EU, without Parliament’s authority. Since the original High Court ruling in that case, a flurry of commentary on it has appeared – some (in the press) highly critical and unpleasantly vitriolic in nature, leading to the eventual defence by the Lord Chancellor of the independence of the judiciary. We are in extraordinary times. It is impossible to see how the judges might in any sense be branded ‘enemies of the people’, in the words of the *Daily Mail*. The *Miller* ruling acknowledges the crucial role of Parliament in protecting rights, and the legal requirement for democratic debate so that rights may not be removed by the government alone. It is not a judicial grab for power. The Court did not seek to overturn any legislation, nor to claim power from the legislature. It upholds a balance of powers between the Parliament, Executive and Courts.

The uncodified, flexible British Constitution very often provides no clear answer to major questions, and this enables the elaboration of tenable arguments. The very existence of the *Miller* lawsuit illustrated the contestation that exists on central issues. Nonetheless, the majority judgment in *Miller* draws on fundamental principles of UK Constitutional law, deeply rooted in constitutional history. The basis of the claimants’ case was that the ‘constitutional requirements’ (in the terminology of *Article 50 TEU*) require Parliament’s authority for triggering Article 50. The UK enabled its accession to the (then) EEC to be ratified by the *European Communities Act (ECA)* 1972. Under British law, a statute may only be repealed by another statute, and not by the exercise of prerogative power. This is clear from *Fire Brigades Union* and other cases. However, as the actual effect of Article 50 notification is to trigger a 2-year timeline at the end of which the UK ceases to be an EU member state (unless extended by unanimity of all EU Council members) triggering Article 50 in fact nullifies the effect of the ECA in UK law. The prerogative cannot be exercised in a manner which would ‘turn a statute into what is in substance a dead letter’ or ‘cut across the object and purpose of an existing statute’ (see again *Fire Brigades Union*).

During the EU referendum, voters were constantly urged to ‘take back control’ and regain Parliamentary sovereignty from the EU. Yet in what sense would Parliament be ‘taking back control’, if the government were able, using its ancient prerogative powers, to manage the whole EU withdrawal process without any significant parliamentary involvement? That would be extremely undemocratic, and democracy is what we are told the EU referendum was about. There is a wealth of case law supporting the claimants’ case, some of it dating back to the 17th century and the English Civil Wars. These wars, and the ejection of two kings, established that Parliament is sovereign and the Executive cannot ignore it, where it has no
legal authority to do so. The Supreme Court judgment makes clear that the government does not have any such legal authority in the context of triggering Article 50. If much of Brexit, and the law surrounding it is uncertain, this at least may be termed ‘Constitutional law 101’. Unfortunately, the spectre of an executive power-grab continues to loom over the British Constitution well after the conclusion of Miller – as the prospect of widespread delegated legislation and Henry VIII powers in the ‘Great Repeal Bill’ becomes evident.

EU Law as a Source of National Law

The *Miller* case may well be the last occasion on which the UK Supreme Court interprets the nature of EU law, an issue given perhaps less consideration in UK courts than it merited, even in the pivotal 1991 House of Lords *Factortame judgement*. The relationship of EU law to national law has been another murky area of the British Constitution. It is ironic that the most far reaching and definitive statement on the status of EU law within UK law was given by the Supreme Court in *Miller* when Britain is on the point of leaving the EU. For the majority of the Court, EU law is a ‘source of UK law’, a holding crucial to its analysis. The ECA is a ‘conduit pipe’, for EU law, which is ‘an independent and overriding source of domestic law.’ EU law was ‘grafted onto’, and so became a facet of, UK law. This judgment recognises the special nature of EU law, and its distinction from international law more generally, because of its capacity for direct effect, and to act as an independent source of national law. Contrast this view to that of the dissenting judges, for example Lord Reed, who held that ‘EU law not itself an independent source of domestic law, but depends for its effect in domestic law on the ECA’. Because Lord Reed perceived EU law as distinct from domestic law, triggering Article 50 could be a prerogative act, as it did not involve the removal of domestic rights in a traditional sense, nor the removal of a source of UK law.

The ‘Wrong’ Kind of Rights?

The differing views expressed on the nature of EU rights reveal some very different approaches to rights, and their place in domestic law. The claimants in *Miller* also argued that, because constitutional principle holds that only Parliament may limit or abrogate rights, it also follows that Article 50 may, because of its ultimate effect on rights, only be triggered by Parliament. If the UK had not held a referendum, the Government could not have abrogated the rights in the ECA by withdrawing from the EU by unilateral, executive act, and the *European Union Referendum Act 2015* provides no explicit authority for amendment or repeal of the ECA. It was an advisory not a mandatory referendum. These rights-related arguments were upheld in *Miller* and earlier confirmed by Lord Oliver, who stated in *J H Rayner (Mincing Lane) v Department of Trade and Industry*: ‘...the Royal Prerogative, whilst it embraces the making of treaties, 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.’ (at 500).

In an argument referred to by the UK Government in *Miller* in the Supreme Court but ultimately unsuccessful, the legal philosopher John Finnis compared EU law to bilateral double taxation treaties, arguing that in neither case are rights created whose destruction only Parliament can authorise. Such an argument appears to suggest that as rights under EU law are not somehow rights in the relevant sense, they are not sufficiently important to merit democratic scrutiny by Parliament. We might draw a comparison – just as our railways have
floundered and been delayed by the ‘wrong kind of’ leaves or snow, so the perception of some was that Brexit was being held up by the ‘wrong’ kind of rights. The argument is that rights derived from the ECA are not rights in the fullest sense, because their real authority derives from outside UK law, in an international treaty. Such an argument seems to suggest different classes of rights exist, meriting lesser protection from government acts that may destroy or violate them, that ultimately rights only really count if fully homegrown, because only then may Parliament be a safeguard against their abolition. (We might ask in passing how many homegrown rights in this sense we actually have? Not so many. That is why the legislation that is the Human Rights Act 1998 was deemed necessary in the first place, to provide effective implementation of the ECHR.)

This analogy drawn with double taxation treaties fails to take account of the special and singular nature of EU membership. EU law is, according to the Court of Justice in van Gend en Loos, a ‘new legal order’ which gives individuals directly effective, enforceable rights which become part of their national legal heritage. EU rights are not a foreign body, a distinct and separate element, in the way most international treaties are regarded by UK law. Direct effect has allowed EU law to pierce the veil of domestic law and for EU law to become directly enforceable in national law, as part of national law. The point is that EU rights should become homegrown, part of our legal patrimony. But it is just this viewpoint that Brexit repudiates. Indeed, animosity to the Human Rights Act also reveals a belligerence to any rights not rooted in the Common Law. In his recent book, On Fantasy Island: Britain, Europe, and Human Rights, Conor Gearty describes an antipathy towards the Human Rights Act and European Human Rights law, which is often coupled with the desire for a return to a Britain without the HRA, without the EU, to a British exceptionalism, when the Empire was great, and Britain truly controlled her own borders, displaying the ‘lonely courage of an ancient island people.’ But this, as Gearty reminds us, is fantasy, unrelated to Britain’s real place in world, indeed a fantasy island that is constantly called to account by a geographical and socio-economic reality.

Withdrawing from Europe

It is this Europe of free movement, of rights, of international judges, of perceived curbs on national sovereignty, that much of Britain rejected in the Brexit referendum, and more definitively in its formal act of delivering the Article 50 withdrawal letter. Now the clock starts ticking. The UK has two years to unravel its relationship with the EU and attempt to forge a new one. Depending on one’s viewpoint the Article 50 letter content, and in particular its seven proposed ‘principles for our discussions,’ might seem ambitious, or alternatively, unrealistic. If these negotiations fail, the UK will leave the EU in March 2019 without a deal, and Theresa May acknowledges that ‘the default position is that we would have to trade on World Trade Organisation terms.’ This is the ‘cliff edge’ that many fear, and indeed this would mean 10 per cent tariffs on car exports and (often much) heavier duties on agricultural goods exported to EU markets. The human costs are ever apparent – another principle stated by the Article 50 letter is that ‘we should always put our citizens first’. This statement may at the least raise a wry smile from those EU citizens who have been caught in the crossfires of Brexit to date, and who still have no clarity as to their rights to stay in the UK post-Brexit. But Brexit is also a very real rejection of the notion of EU citizenship, a status (unlike British citizenship) highly dependent on rights and destined, according to the European Court of
Justice, to become ‘the fundamental status of nationals of the Member States’. In leaving the EU, Britain is rejecting a certain type of constitutional order, built on a rights-based citizenship and guaranteed by a higher level of entrenchment than parliamentary sovereignty can offer.

**Alternative Views of the Constitution**

The Article 50 letter also stresses that, ‘we will negotiate as one United Kingdom, taking due account of the specific interests of every nation and region of the UK as we do so.’ However, it is unclear, to say the least, that the UK Government is taking due account of the devolved nations’ interests. For example, no mention at all is made in the Article 50 letter of any particular arrangements for Scotland, nor to the Scottish Government’s proposals for a differentiated solution for Scotland, as published in ‘Scotland’s Place in Europe’, although Northern Ireland is singled out as a special case. This leaves very little space for Scotland to protect its interests in the context of the withdrawal process, where it is the UK that will do the negotiating.

From the perspective of the UK Government, the British Constitution is unitary in nature, possessing certain key elements: foreign affairs are reserved to the UK Government, and this includes EU membership. This view approaches the devolved nations as lacking legal rights in this area, at most to be consulted as matter of courtesy.

But there exists a contrasting view of the Constitution, held by many in devolved nations and some in England. This alternative approach views the UK as a union founded on treaties (Treaty of Union 1706, Good Friday Agreement) and reliant on ongoing consent. It also recognises constitutional practice where much (ie conventions) is not strictly speaking law. Recognition of convention will be vital in the context of the ‘Great Repeal Bill’, where the Sewel Convention will require consent of the devolved legislatures if Westminster appropriates any power returned from the EU that falls within a devolved competence. (The Supreme Court in Miller may have rejected the justiciability of the Sewel Convention, notwithstanding its entrenchment in the Scotland Act 2016, but no-one doubts its binding nature as a political convention.)

This alternative interpretation of the British Constitution also recognises that the UK has been transformed, or even revolutionized, by external developments and memberships (such as the EU and Council of Europe) and recalibrated internally by devolution arrangements since 1998 (but also by the Human Rights Act, and a desire for a more principled constitutional development than parliamentary sovereignty allows). As well as enshrining the Sewel Convention in law, the Scotland Act 2016 declared the permanence of the Scottish Parliament, a provision which, if it is to have any meaning, flies in the face of orthodox constitutional law’s assertion of parliamentary sovereignty. We also see a concept of the decentralized and fragmented state at work in Northern Ireland, where the Good Friday Agreement sets out complex provisions regarding cross-community consent, self-determination, and also a role for the Republic of Ireland (and the EU).

Which view of the British Constitution will prevail, and will the Union survive the Brexit process, now that a formal vote calling for a second independence referendum has been made by the Scottish Parliament? In On Fantasy Island, Conor Gearty writes that ‘the
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problem when political fantasy collides with legal facts is that fantasy can never win’. Perhaps many aspirations for Brexit will be revealed as political fantasy when confronted with the legal challenges of withdrawal under Article 50 and the complexities of the ‘Great Repeal Bill’ (or Bills)?

However, what are the ‘legal facts’ here? Our Constitution, let alone our constitutional law, does not provide determinate answers to many of the questions posed by Brexit. We might argue that this is unsurprising, that Brexit is an extraordinary event, constitutionally unforeseeable, introducing a potential new revolution into UK law and society. Yet the British Constitution has long been vaunted for its adaptability and its ability to cope with new circumstances (the loss of Empire, major world wars, and so on) and for its flexibility and its enduring nature. However, the challenges of Brexit reveal the Constitution’s 21st century weaknesses. An event as momentous as a British withdrawal from the EU requires clear and principled constitutional law as a guide But we do not have that. The British Constitution has become a contested and uncertain object, of sometimes ghostly and shifting form. As a result, we are thrown back onto politics, where the most powerful tend to dominate.

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