Briefing Note

Brexit, Article 50
&
The Supreme Court's Nelsonian Eye

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Executive Summary

If the Supreme Court upholds the High Court's decision in *Miller*, it will open up debate about use of the Royal Prerogative, and in particular whether the UK's original accession to the EEC really was sufficient to make European law supreme over domestic law.

The judiciary are themselves on trial because *Miller* forces them to confront several dilemmas:

a) if they accept use of the Royal Prerogative in 1972 to take us into the EEC/EU but not in 2016 to take us out, they will expose decades of judicial *political* bias in favour of the EEC/EU;

b) if instead, they accept use of the Royal Prerogative in both 1972 and 2016 they will expose the democratic deficit at the heart of our membership of the EU by highlighting that much of our law since 1972 has not had its source in common law or statute;

c) if they stray into political territory by instructing Parliament how to exercise its sovereignty, by for example requiring Parliament to pass a Statute authorising the Government to issue notice under Article 50, they risk unravelling the separation of powers in the Bill of Rights 1689 which protects the judiciary from political interference;

d) if they uphold the High Court's decision it will be seen as part of a pattern of behaviour by a reactionary and increasingly isolated elite, against the democratically expressed will of the people; and

e) by denying UKIP a voice at the hearing itself, the judges ensured that they heard arguments only from various shades of "Remain", this meant that in some respects the legal argument became an "echo chamber" that prevented them (and the watching media and the country at large) from fully exploring the constitutional significance of the referendum result.

If it had been permitted to appear in the Supreme Court, one of UKIP's arguments would have been that the Referendum constituted a "General Council of the Realm", in effect a Parliament of *all* the Commons, and was therefore binding on the Government irrespective of that not being explicitly stated in the European Referendum Act 2015.

Background

The metropolitan elite have spent the summer dreaming up ways to stay in the EU in all but name. It has been suggested that the UK can remain in the Single Market, the Customs Union, join the Unified Patent Court, and the European Free Trade Area. Each of these would make the UK subservient to EU law and to the European Court of Justice (or its EFTA equivalent), they would make the UK pay for the privilege of being a vassal state and cannot be reconciled with a vote to leave the EU.

The High Court Decision

Most controversial of all this summer's machinations has been the judgment of the High Court: namely that the Government cannot use the Royal Prerogative to issue notice to leave the EU because doing so would eventually abolish statutory rights.

The judgment rightly puzzles ordinary people given that the entire country voted in the referendum on the basis that it was final and that no further vote would be needed.

Moreover, this week's Motion of the House of Commons instructing the Government to invoke Article 50 is clear evidence that they, like the 17.4 million people who voted Brexit, also understand that there is no need for further approval.

The Supreme Court

In appealing the High Court's decision to the Supreme Court, the Government pointed out that:

> a) the Royal Prerogative alone took us into the EEC in 1972; and
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> b) the European Communities Act 1972 did not ratify the UK's entry into the European Community but is merely a conduit for giving effect to the rights created at an international level by the exercise of the Royal Prerogative.

If the Government is right in its assertion that the 1972 Act *recognises but does not create* a new source of law, it follows that EU rights do not have a statutory source.[1] In this context, the long established principle[2] that the Royal Prerogative cannot abolish common law or *statutory* rights is therefore irrelevant because the new EU source of law is neither.

Some might say that EU rights arise in the UK only after being set out in a UK Statute but that's not quite accurate because, for as long as we are in the EU, and regardless of what a UK Statute may say, EU laws (including Directives and Regulations) can have effect by overriding UK law.

It could have been more forcefully pointed out to the Supreme Court that these rights do not therefore arise *because* of a statute but sometimes *despite* one![3]

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[1] https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/

[2] See the codification of this principle in the Bill of Rights 1689.

[3] for example, the right to prosecute for selling in pounds and ounces in the *Metric Maryrs* case, and the right to fishing quotas in the *Factortame* case.

In this sense a fully sovereign British Parliament has not met since 1972. We have not been living in a democracy all these years - a state of affairs which explains the dissatisfaction with the political class that led to the Brexit vote itself.

The Royal Prerogative

In all the excitement, it is easy to forget that what is sauce for the goose is sauce for the gander: if the Supreme Court agrees with the High Court that the Royal Prerogative is *insufficient* to take us out of the EU then how can it have been *sufficient* to take us in?

Admittedly, there have been statutory restrictions placed on the Royal Prerogative since 1972, but Parliament has not chosen to restrict its use in respect of notice under Article 50, in fact it deliberately avoided doing so.[4] Thus, if the Supreme Court confirms that the Royal Prerogative cannot alter rights created by membership of the EU, this must have always been the case, and must apply not just to their alteration, but also (more fundamentally) to their creation.

On that basis our entry into the EEC would have been insufficient to make European Regulations legally enforceable to the extent they removed domestic law rights. This was always the traditional view that UKIP had of UK membership of the EEC/EU. But after more than 40 years of law based on the premise that the UK is a member, it was recognised by many that the practical problems arising from declaring so many laws and legal decisions unconstitutional had become too great and far reaching.

For these practical purposes many Eurosceptics eventually accepted that the Royal Prerogative took us in to the EEC, and for similar practical reasons it follows that the Supreme Court would be entitled to accept that the Royal Prerogative can take us out.[5]

The Unwritten Constitution

The whole point of having an unwritten constitution is to allow flexibility when the need arises. If a statement on the Constitution is put to the man on the Clapham omnibus and he answers "but of course, that's blindingly obvious" then why can't the Courts recognise that?

If the Courts refuse to accept that the Constitution has developed because of the result of the referendum (namely that the People have given their sovereign authority to leave the EU) and instead the judges insist on looking only at the written parts of the Constitution, the People would be entitled to conclude that they had witnessed a judicial coup against their sovereignty.

It may one day be regretted that there was no discussion in the Courts about the benefits of accepting and recognising the referendum as a vote by a Parliament of *all* the Commons (and not just the upper and lower houses in Westminster). 23rd June 2016 really will be our Independence Day if the referendum vote is the source and authority for the re-establishment of a fully sovereign parliament of the kind we had before 1972. The referendum result is the

[4] eg The European Union Act 2011 restricts use of the Royal Prerogative in respect of Article 50(3) but not 50(1) or (2) of The Treaty on European Union.

[5] This might, for example, be explained as the adoption into Constitutional Law of the “floodgates” principle in Tort Law.

authority for the Government to use the Royal Prerogative: that is the true legal significance of the referendum.

However, it may take a generation or two for the judges to recognise the referendum result for what it is, not least because Cameron made a strategic decision that the Brexit process should be as poorly defined as possible in order to give political advantage to "Remain" in the referendum campaign.

Turning a Blindfolded Eye

In the same way that the man on the Clapham omnibus has not been heard, despite his roar in the referendum, the Supreme Court refused to hear the submissions of UKIP as an "intervener".

In doing so the Court not only dismissed out of hand the suggestion that a number of the judges had, in the eyes of the public, already demonstrated prejudice against Brexit, but also ensured that there wasn't a pure "Leave" voice in the courtroom, just a series of shades of Remain (given that even the case for the Government was made by the Attorney General, Jeremy Wright MP who campaigned for Remain).

It's therefore not surprising that a number of fundamental arguments were not presented in person at the Supreme Court, for example: that one or more of the judges should recuse themselves, that the current Parliament is not fully sovereign, that use of the Royal Prerogative in 1972 was illegal, that use of the referendum in these specific circumstances makes the whole country a Parliament (the proceedings of which are not justiciable), and that in the 21st century the People are sovereign at times of a General Election or a referendum on a specific matter.

In these circumstances, it is disingenuous for anyone to suggest that matters not addressed in argument in the Supreme Court can be ignored as either irrelevant, undisputed or settled law.

In rejecting UKIP's application to be heard the statue of Justice at the Supreme Court is in effect saying "I see no ships" whilst holding a telescope up to a blindfolded eye (sic).

Conclusion

Let's not beat around the bush. The case before the Supreme Court puts the judiciary on trial before the Court of public opinion.

If the Supreme Court accepts use of the Royal Prerogative in 1972 but not in 2016 it will demonstrate decades of judicial bias in favour of the EEC/EU, suppress the sovereign will of the people and undermine the legitimacy of swathes of legislation since 1972.

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