Was *R (Miller) v Secretary of State for Exiting the European Union* correctly decided?

by Jacob M. Nolan

The case of *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union*[1] is likely to be amongst the most important cases on constitutional law decided by the UK Supreme Court. In *Miller,* the Supreme Court were required to rule on whether the UK Government (the executive) could trigger Article 50 of the Treaty on European Union without the authorisation of an Act of Parliament, through the use of the Crown's prerogative. On an 8 – 3 majority, with Lords Reed, Carnwath, and Hughes dissenting, the Supreme Court upheld the previous High Court ruling that an Act of Parliament was first required.

Was this, as the tabloid press claimed after the antecedent High Court ruling, an undemocratic action of unelected 'enemies of the people'[2] or was the ruling, in fact, a check on the power of the executive to act without the authorisation of primary legislation. It is necessary to read the reasoning the judges gave for their ruling to decide whether *Miller* was correctly decided.

One must first note that any claims of the judges being undemocratic by failing to rule in the favour of the UK Government, purely because the government was acting upon the result of the referendum, are simply intellectually disingenuous. In judicial review cases judges must simply rule on whether the actions of public bodies are lawful or not; they do not analyse the merits of the decision, or attempted action, made. As Sir Thomas Bingham said in *R v Cambridge Health Authority Ex parte B (No1)*[3] at 906:

> "The courts are not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind... We have one function only, which is to rule upon the awfulness of decisions. That is a function to which we should strictly confine ourselves."

Whilst this case concerned medical treatment, the principle relating to judicial review is still authoritative. Whether Parliament would decide to honour the result of the referendum or not was simply not relevant in deciding the case; as AV Dicey said:

> "The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of the electors."[4]

That was an entirely separate, non-legal issue, that would have to be dealt with through different channels of democratic redress, such as campaigning or electing new Members of Parliament who would vote to trigger Article 50. The Supreme Court and the High Court both felt similarly, with the High Court stating:

[1] [2017] UKSC 5; [2017] 2 W.L.R. 583, (BAILII http://www.bailii.org/uk/cases/UKSC/2017/5.html - accessed 4/9/2017)
[2] James Slack, 'Enemies of the People' *Daily Mail* (4 November 2016)
[3] [1995] 1 W.L.R. 898
[4] AV Dicey, *Introduction to the Study of the Law of the Constitution,* (8th edition, 1915) page 57

> "It deserves emphasis at the outset that the court in these proceedings is only dealing with a pure question of law. Nothing we say has any bearing on the question of the merits or demerits of a withdrawal by the UK from the EU; nor does it have any bearing on government policy, because government policy is not law. The policy to be applied by the executive government and the merits or demerits of withdrawal are matters of political judgment to be resolved through the political process. The legal question is whether the executive government can use the Crown's prerogative powers to give notice of withdrawal. We are not in any way concerned with the use that may be made of the Crown's prerogative power, if such a power can as a matter of law be used in respect of article 50, or what will follow if the Crown's prerogative powers cannot be so used."[5]

The ratio decidendi of the case is:

> "As explained […], before (i) signing and (ii) ratifying the 1972 Accession Treaty, ministers, acting internationally, waited for Parliament, acting domestically, (i) to give clear, if not legally binding, approval in the form of resolutions, and (ii) to enable the Treaty to be effective by passing the 1972 Act. Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, 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."[6]

> "Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation."[7]

To summarise, the court ruled that the European Communities Act (ECA) 1972 did not give the executive implied permission to trigger Article 50 and that if the executive wished to trigger Article 50 an Act of Parliament would be required.

The Supreme Court rejected the defendant's argument which relied upon *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg*[8], where it was held that ministers could ratify a protocol to the EU Treaty without the permission of Parliament, and that, because the ECA 1972 had not expressly or impliedly abrogated ministers' powers to withdraw from the Treaties to which it applied, the executive must have implied permission to withdraw. Speaking as a majority, the Supreme Court held that the 1972 Act, as well as subsequent Acts, brought the UK into the European Economic Community and, later, the European Union. In 1972, ministers for the government waited until the ECA was passed before they signed and ratified the Accession Treaty. This meant that the executive had known that only Parliament had the privilege to make such gargantuan changes to the constitution and legislative process. *Rees-Mogg* was held to not be applicable as it only related to ministers' powers regarding international treaties; international treaties which do not apply to domestic law and only relate to the UK's international relations would not have an impact on domestic legal rights. EU Treaties are inextricably linked to domestic law, both as a source and conferring legal rights. Even Lord Carnwath, who dissented, felt that there was simply no precedent for the executive to withdraw from treaties[9]. The court accepted that Parliament did have the right to give the executive the power to withdraw from EU Treaties without a specific Act of Parliament being passed; however,

[5] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] 1 C.M.L.R. 34 at para 5
[6] *R (Miller)* at Para 90
[7] *R (Miller) at* Para 121
[8] [1994] Q.B. 552
[9] *R (Miller)* at para 246 - 247

they felt that there was no evidence that this was the case regarding the 1972 Act. The court referred to Lord Hoffman in *R v Secretary of State for the Home Department, Ex p Simms*[10]:

> "The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost… Fundamental rights cannot be overridden by general … words… because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"

The long title of the 1972 Act was: 'An Act to make provision in connection with the enlargement of the European Communities.' The court felt that it was entirely inconsistent to suggest that the Act, which expressly stated its purpose was to enlarge the European Communities, could impliedly give the executive permission to leave the European Communities, thus shrinking the European Communities. At para 159, Lord Reed did note that, according to *JH Rayner (Mincing Lane) Ltd "Department of Trade and Industry"*[11], the exercise of the executive regarding Treaty-making powers is only reviewable by the courts if statute has given permission.

It is also necessary to consider the dissenting judgements of the Supreme Court Justices. At para 177, Lord Reed states that he dissented as he didn't believe an Act of Parliament was required for leaving the European Union. The rationale Lord Reed gave is that the ECA 1972 'Imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU. It does not, therefore, affect the Crown's exercise of prerogative powers in respect of UK membership.' Lord Reed also felt that because EU law is only given effect onto the domestic law of the UK by the ECA 1972, allowing the executive to trigger Article 50 would not result in 'alteration in the fundamental rule governing the recognition of sources of law.' He concluded that, therefore, it follows that Ministers should be allowed to give notification of Article 50. Alison L Young describes Lord Reed's reasoning eloquently:

> "Parliament enacted legislation to join the EU, but the effect of the legislation was conditional upon membership. The UK's membership of the EU commenced following an action of the Government, using its prerogative powers, to ratify the Treaties relating to membership of the then European Communities. Therefore, it was open to the Government to use its prerogative power to withdraw from the EU. To do so would have no impact on domestic law."[12]

Where the majority drew a distinction, is where Lord Reed failed to. The majority accepted that there was a difference between prerogative powers which can be used to 'increase' or 'decrease' the 'flow' of the EU law, using the 'pipeline' analogy, and using the prerogative powers which completely cut the UK off from EU law. Lord Reed felt that these two were synonymous and, because the ECA allowed for the executive to choose to ratify treaties, the ECA also allowed the Ministers' to choose to trigger Article 50 and begin withdrawal from the EU.

The Supreme Court was right to dismiss the legal arguments of the defendant, not only due to the claims being baseless, but also because a dangerous precedent would have been set. The legal argument presented by the defendant would have granted an enormous amount of extra power to the executive. This would require Parliament to be meticulous to an extreme and unrealistic degree in future legislation, and potentially have to amend large amounts of current legislation. It would mean that as long as the executive has been given a right through legislation, they can act in a way that is antithetical to the powers given unless there are express or implied restrictions. This is an extremely perilous precedent to set. With regard to Lord Reed's dissenting judgement, it is argued that this would have allowed the executive to alter the domestic law of the United Kingdom, which it is unable

[10] [2000] 2 A.C. 115
[11] [1990] 2 A.C. 418, 499-500
[12] Alison L Young, '*R. (Miller) v Secretary of State for Exiting the European Union*: thriller or vanilla' [2017] European Law Review, Vol. 42 (2), 280-295, 288.

to do according to the country's constitutional values. By following previous precedent, the court upheld centuries of the rule of law, dating back to Lord Coke's curtailment on the executive's power in the *Case of Proclamations*[13]. As Portia said in The Merchant of Venice:

> "It must not be. There is no power in Venice
> Can alter a decree establishèd.
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state. It cannot be."[14]

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[13] [1610] E.W.H.C. K.B. J22
[14] William Shakespeare, *The Merchant of Venice*, (London, 1600) Act 4, Scene 1