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Law and Brexit

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Abstract: This article considers some of the legal issues which will frame the Brexit negotiations. It examines who can trigger Article 50 in the light of the Supreme Court's decision in *Miller* and whether the Article 50 process can be stopped. It also looks at the domestic side of the process of leaving the EU, considering some of the issues raised by the Great Repeal Bill.

Keywords: Brexit, Supreme Court, Article 50, Great Repeal Bill

JEL classification: K400, K100, K330

I. Introduction

When the British electorate voted to leave the European Union (EU) on 23 June 2016, the political and legal worlds collided. Lawyers were forced to address the political reality of the situation; political scientists had to become lawyers very quickly. Everyone is now an expert on Article 50 of the Treaty on European Union (TEU), the rudimentary provision which governs the process of taking the UK out of the EU. This has been the subject of hours of political and legal debate and a momentous decision of the High Court and now the Supreme Court.

This short paper argues that the Brexit process is so challenging and risky that an orderly outcome cannot be guaranteed. The next section looks at which institution can trigger Article 50, section III looks at the question of timing and section IV considers whether the Article 50 process can be stopped. Section V considers the domestic side of the process of leaving the EU, looking at some of the issues raised by the Great Repeal Bill. Section VI concludes.

II. Triggering Article 50: who can do it?

Article 50(1) TEU makes clear that it is the national constitutional traditions which determine how and when to trigger the process to leave. But what are those constitutional traditions? In a country such as the UK with an unwritten Constitution, this

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is unchartered territory. The UK government argued that it should be able to trigger Article 50 due to its executive or 'prerogative' powers. These are the powers by which it makes and unmakes international Treaties. The claimants in the case brought by Gina Miller and others disagreed. They argued that the consequence of triggering Article 50 is to take the UK out of the EU, and thus to deprive UK nationals of key rights such as the right to free movement which they currently benefit from under the European Communities Act (ECA) 1972, the Act that gave effect to EU law in the UK.

It is well established that the royal prerogative cannot be used to abrogate Acts of Parliament; the effect of triggering Article 50 would be to render the ECA 1972 an empty shell. Therefore, the claimants argued, Parliament must have its say before Article 50 is triggered through an Act of Parliament. The High Court agreed with Gina Miller,[1] as did the Supreme Court,[2] albeit on a somewhat different ground.

The government made a stronger case before the Supreme Court, with the benefit of insights provided by extensive academic commentary which has proliferated since the High Court decision.[3] In particular, the government ran the argument that the ECA 1972 was merely a 'conduit' for EU rights. It did not create EU rights but ensured that EU rights could be exercised so long as the UK remained a member of the EU. Therefore, since the ECA conferred no rights, Parliament did not need to be involved in the decision to trigger Article 50 (cf. Craig, 2016).

The Supreme Court rejected this argument. It said that ECA authorized a dynamic process by which EU law became a source of UK law and took precedence over all domestic sources of UK law, including statutes. The ECA operated as a partial transfer of law-making powers, an assignment of legislative competences, by Parliament to EU institutions, unless and until Parliament decided otherwise (paras 67–68). The majority of the Court said that because withdrawal made a fundamental change to the UK's constitutional arrangements, by cutting off the source of EU law, the UK constitution required such changes to be effected by Parliamentary legislation (para 82). The 137-word, European Union (Notification of Withdrawal) Bill[4] was laid before parliament 2 days after the judgment. Its central provision says:

(1) the Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU;
(2) this section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

The Supreme Court was also asked to examine the devolution aspect of triggering Article 50, issues which had not been raised before the High Court in the *Miller* case but had been heard earlier in the Northern Ireland High Court.[5] It was asked to

[1] R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin), http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html

[2] [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf. For discussion, see Elliott (2017).

[3] The parties' written and oral submissions can be found here: https://www.supremecourt.uk/news/article-50-brexit-appeal.html

[4] http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal.html

[5] R (McCord) v The Secretary of State for Northern Ireland [2016] NIQB 85, http://www.bailii.org/nie/cases/NIHC/QB/2016/85.html

consider whether, given the fact that Brexit will have an impact on devolved matters, the devolved administrations should normally have a say via a consent motion, as the so-called 'Sewel Convention' requires. Further, since the devolved administrations have a statutory obligation not to breach EU law, it was argued that the prerogative could not be used to undermine legislation in such a way. On this point the Supreme Court was unanimous—it had no jurisdiction to rule on a Convention: 'Judges are neither the parents nor the guardians of political conventions; they are merely observers.' It continued that while they can 'recognise the operation of a political convention in the context of deciding a legal question', judges cannot 'give legal rulings on its operation or scope, because those matters are determined within the political world' (para 146).

It was always likely that the Supreme Court would uphold the High Court's ruling on the main issue of whether an Act of Parliament was needed because the government had not changed its mind on the key concession it had made to the High Court that Article 50, once triggered, is irreversible. The political reason for this concession was clear: if the Article 50 process was reversible, Brexit would no longer mean Brexit. But there is a legal reason, too: if there is uncertainty over whether a decision to trigger Article 50 is reversible, this is a matter for the Court of Justice to decide on a 'reference' from the Supreme Court under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The Supreme Court, as the court of last resort in the UK, would be obliged to make a reference, but only if the point was *necessary* to enable it to give judgment. The delay resulting from any reference, together with the potential of a serious political backlash if 'Europe' was seen to be impeding the Brexit process, made a reference unlikely. The Supreme Court wanted to decide the case itself, with an 8:3 majority in favour of the claimant. An 11-justice court was a first for the Supreme Court—and necessitated by the need to avoid any perception that, were the usual five judges to hear the case, they had been selected for their pro- or anti-EU sentiments.

III. Article 50 and timing

EU politicians have made it abundantly clear that there are to be no negotiations without notification. In other words, no formal or informal soundings can take place until Article 50 has been triggered. This is more problematic than first appears, due to issues with timing and sequencing. If, as the Prime Minister Theresa May has said, the Article 50 process will be triggered by the end of March 2017, this allows 2 years for the negotiations, unless that period is extended by unanimous agreement. But that 2 years includes the time when the French, Dutch, and German elections are occurring, when key politicians are distracted by domestic issues. Also factored into that period is the time for discussion with the UK devolved administrations, consideration and vote on any draft deal by the European Parliament and the Westminster parliament, not to mention the time that will be spent dealing with any unexpected crises that arise during that period. Guy Verhofstedt, the Brexit lead for the European Parliament, estimates that the negotiating period will in fact be only 15 months. And there are some major issues to be discussed in that time: UK budgetary contributions and the cost of the divorce (a vastly sensitive and complex matter), pension liabilities for British civil servants working in Brussels, the moving of EU agencies currently

based in the UK, research funding, the UK's position in respect of its obligations entered into by the EU on behalf of the member states with third countries, to name but a few.

And this says nothing about the future relationship between the UK and the EU. Article 50 does not provide the basis for concluding any such agreement; this will have to be done by using the powers laid down in Articles 207 and 218 TFEU which allow the EU to negotiate international agreements with non-member states. Any such agreement is likely to be a 'mixed agreement', which means it will probably require the unanimous agreement of the 27 member states in council, the consent of the European parliament, and the agreement of 38 national and regional parliaments, including Wallonia in Belgium which initially blocked the EU's deal with Canada (Comprehensive Economic and Trade Agreement: CETA).

In an important Opinion,[6] handed down on 21 December 2016, Eleanor Sharpston, the British Advocate General at the Court of Justice, considered the EU–Singapore free trade agreement to be a mixed agreement. She noted (para 566) that

> the need for unity and rapidity of EU external action and the difficulties which might arise if the European Union and the Member States have to participate jointly in the conclusion and implementation of an international agreement cannot affect the question who has competence to conclude it.

In other words, even though mixed agreements are legally and politically difficult to conclude and implement, that cannot affect the question of who has competence to conclude the agreement. The Court of Justice will decide the case in the spring of 2017 but the Advocate General's careful analysis provides a strong indication of the direction of travel.

There is a further problem. At the moment, it seems, the EU is insisting it will not begin negotiations on its future relationship until the UK becomes a 'third country'—i.e. only after the divorce is completed. Thus the divorce and the negotiation of the future relationship will be done sequentially, not in parallel. Given that any future deal could take years to negotiate, let alone adopt by the EU institutions and the 38 national and regional parliaments, there is likely to be a period of years of great uncertainty. Hence the need for some transitional arrangements, a point that key politicians are increasingly alluding to (albeit not expressly envisaged by Article 50). Article 50 does make clear that the divorce negotiations must take 'account of the framework for [the UK's] future relationship with the Union'. This would indicate that, in the divorce settlement, there should be some agreement on the kind of future relationship the UK might have with the EU. Article 50 might also allow for some transitional arrangements, provided the arrangements are genuinely transitional and do not morph into something more permanent. This is because Article 50 concerns the divorce and the divorce alone, agreement for which can be concluded by qualified majority voting in Council. The more relaxed procedure under Article 50 cannot be used to circumvent the requirements under Articles 207 and 218 TFEU for a deal on the future relationship.

[6] Opinion 2/15, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=186494&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=324328

IV. Can the Article 50 process be stopped?

As we have seen, in *Miller* the UK government conceded that Article 50, once triggered, cannot be reversed. In other words, once the train has left the station and the Article 50 process is under way, it cannot be stopped. This means that once Article 50 is triggered there will, according to Article 50 itself, be one of three outcomes: (i) a divorce agreement, possibly (probably?) accompanied by transitional arrangements; or (ii) an agreement to extend the negotiating period; or (iii) no agreement with the result that the EU Treaties cease to apply at the end of 2 years (a disorderly Brexit). The first outcome is obviously the most desirable for both sides; the second is unlikely, given the requirement of unanimous voting; the third would be disastrous and create legal and economic chaos.

There has, however, been talk of a fourth possibility, but one which Article 50 does not address: that the Article 50 process can be stopped in its tracks. Two situations are envisaged. The first is where, in a general election before the completion of the negotiations, a party is elected on the ticket of stopping the Article 50 process. The second is where the negotiations are going so badly for the UK that shortly before the end of the 2-year period the UK government decides it wants to stop the process. Can this be done? The answer is no one knows for sure and it would ultimately be for the Court of Justice to decide; a crowd-funded case has already been launched in the Irish court aimed at testing this point.[7] However, the following points should be noted. The House of Lords considered this question before the referendum.[8] Sir David Edward, former British judge at the Court of Justice, told the committee: 'It is absolutely clear that you cannot be forced to go through with it if you do not want to: for example, if there is a change of Government.' Professor Derrick Wyatt supported this view:

> There is nothing in the wording to say that you cannot [stop the Article 50 process]. It is in accord with the general aims of the Treaties that people stay in rather than rush out of the exit door. There is also the specific provision in Article 50 to the effect that, if a State withdraws, it has to apply to rejoin *de novo*. That only applies once you have left. If you could not change your mind after a year of thinking about it, but before you had withdrawn, you would then have to wait another year, withdraw and then apply to join again. That just does not make sense. Analysis of the text suggests that you are entitled to change your mind.

Both witnesses drew a distinction, however, between the law and the politics of such a scenario. While the law was clear, 'the politics of it would be completely different', according to Professor Wyatt. Their views are shared by some distinguished experts.[9] However, there may be a difference between an attempt to stop the Article 50 process, following a general election, and a more strategic attempt to stop Article 50 during or following unfavourable Brexit negotiations.

[7] http://uk.businessinsider.com/jo-maugham-on-article-50-brexit-legal-case-irish-court-2016-12. It is also testing the question whether a further parliamentary vote is needed to trigger Art. 127 which will take the UK out of the European Economic Area (EEA) Agreement.

[8] European Union Committee (2016).

[9] See, for example, Lord Kerr, who drafted Article 50 (http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628), and Professor Paul Craig at http://www.39essex.com/content/wp-content/uploads/2016/07/Brexit-39-Essex-Chambers-Paul-Craig.pdf.

V. The Great Repeal Bill

At the domestic level, the (misnamed) Great Repeal Bill (GRB) will be working its way through the parliamentary process. Intended to repeal the European Communities Act (ECA) 1972, the Act that took the UK into the EU, the GRB will in fact expand the volume of legislation on the statute books, since it will provide a UK legislative footing for all EU legislation. As Theresa May said in her 2016 party conference speech:

> As we repeal the European Communities Act, we will convert the '*acquis*'—that is, the body of existing EU law—into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free—subject to international agreements and treaties with other countries and the EU on matters such as trade—to amend, repeal and improve any law it chooses. But by converting the *acquis* into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate.

She also made clear that 'existing workers' legal rights will continue to be guaranteed in law—and they will be guaranteed as long as I am Prime Minister'. While many workers would welcome this concession, it contains the implicit recognition that the taking back of control is not as absolute as many of those voting 'Leave' might have thought, a point made explicit by her recognition that any changes to the law will be 'subject to international agreements and treaties with other countries and the EU on matters such as trade'. The UK is involved in over 14,000 international agreements.[10]

The Prime Minister's claim that any changes in the law will have to be 'subject to full scrutiny and proper Parliamentary debate' is undermined by a speech made shortly afterwards by David Davis, Secretary of State for Exiting the EU. He said: 'The Repeal Bill will include powers for ministers to make some changes by secondary legislation, giving the Government the flexibility to take account of the negotiations with the EU as they proceed.'[11] In other words, the Bill will contain powers, sometimes referred to as Henry VIII clauses, to make changes to current primary and secondary legislation by statutory instruments (secondary law) which do not require the full scrutiny of Parliament. Taking back control therefore means taking back control by the executive, not parliament.

Not only will the Great Repeal Bill not repeal much legislation—rather it will expand the volume of legislation on the UK statute book as the UK implements all EU Regulations—but it will also generate a vast volume of new rules as the UK sets up new agencies and bodies, or extends the powers of existing bodies, to do the work currently done by the EU, for example in the field of pharmaceuticals.[12] David Davis also recognized this:

> [The GRB] will also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level,

[10] www.gov.uk/guidance/uk-treaties

[11] https://www.gov.uk/government/news/government-announces-end-of-european-communities-act. See also the White Paper (Department for Exiting the European Union, 2017, p. 13).

[12] Cf 'Pharma companies argue against new UK regulator', https://www.ft.com/content/713b61be-b6f8-11e6-ba85-95d1533d9a62

> and amendments are required to ensure the law operates effectively at a domestic level. The ECA created a power which currently exists for Ministers to make secondary legislation to give effect to EU law.

This is not to mention the devolution issues which will have to be negotiated internally within the UK. The repatriation of powers from Brussels does not necessarily mean they will all accrue to Westminster: Holyrood, Cardiff, and Stormont may demand some of the action, too.

And then there is the question of the decisions of the Court of Justice. David Davis is clear: 'The European Court of Justice (ECJ) has interpreted EU law and delivered judgments that were binding on the UK and other member states. The repeal Bill will end ECJ jurisdiction in the UK.' However, the decisions of the Court of Justice are part of the *acquis* which the Prime Minister has said will be part of UK law. It is likely that the decisions of the Court of Justice which pre-dated Brexit will continue to bind British courts; those after Brexit will have persuasive effect only.[13] Further, in some fields, like EU competition law which has extra-territorial effect (i.e. it applies to companies based outside the EU but whose decisions and behaviour are felt within the EU), companies will want to continue to have access to the ECJ to challenge decisions of the Commission. Severing the ties with the ECJ will be less complete than some might expect.

VI. Conclusions

Brexit is going to be the most demanding political and legal exercise in peace time which will challenge every sinew of the civil service, a civil service at its smallest since the Second World War. The negotiations with the EU will involve high politics and attention to the finest detail. The GRB will involve possibly even greater legal difficulties. The parliamentary draftsmen will be challenged as they have never been before. And all of this will take place in the context of a difficult European environment where the Eurozone and refugee crises remain unresolved and with international terrorism never far away and an uncertain international environment, dominated by the election of the new President of the United States. But perhaps most difficult will be managing the heightened but varied expectations of those who voted 'Leave' while offering something to the 48 per cent who voted 'Remain'.

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[13] There is a hint in the Brexit White Paper that the interpretative obligation might be stronger than that. It says: 'In general the Government also believes that the preserved law should continue to be interpreted in the same way as it is at the moment.'

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