A Deeply Troubling and Wrong-Headed Decision

This was the comment from Lawyers for Britain about yesterday's court ruling:-

When it comes to using the prerogative for "less Europe", there are implied imitations which do not seem to exist for "more Europe".

On 3rd November 2016 the Divisional Court handed down its judgment in R (Miller) V- Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin). The court has, to the surprise of most informed observers, decided that it is outside the prerogative powers of the Crown for notice to be given under Article 50 of the Treaty on European Union to withdraw from the European Union.

In reaching this decision, the judgment has overturned the accepted understanding about the respective power of the Crown on the international plane to accede to and withdraw from international treaties, and the powers of Parliament to alter the internal law of the United Kingdom.

The European Communities Act 1972 was a constitutional innovation for the United Kingdom. It linked international treaties directly to the internal law of the United Kingdom by giving the European Treaties and supranational legislation made under them so called "direct effect." That means that they have force in UK internal law – and therefore alter the content of the law – without recourse to Parliament.

The judgment argues that this feature of the 1972 Act means that the Crown has no power to withdraw from the EU treaties, because doing so would have the effect of altering domestic law, which only Parliament can do.

This argument is illogical and does not hold water. There are many acts which the government can carry out on the international plane under the European treaties which have the effect of altering UK domestic law, and in doing so either confer rights on people or deprive them of rights. Whenever the UK representative on the Council of Ministers joins in passing into law a directly applicable EU Regulation then the Crown in using the prerogative power to alter internal UK law without that alteration of the law going through Parliament. This is simply a consequence of the direct effect machinery of the 1972 Act.

So why should it be OK to have "more Europe" through exercise of the prerogative power, but wrong to have "less Europe" as a result of Article 50 being invoked and the direct effect parts of EU law ceasing to apply within the UK? Nothing in the wording of the 1972 Act supports such a distinction.

There is a further reason why this decision flies in the face of the obvious intention of Parliament. The Lisbon Treaty, which inserted Article 50 into the Treaty on European Union, was given effect in UK law by the European Union (Amendment) Act 2008. That Act therefore made the Article 50 power available for use by the Crown but did not specify that its exercise would need the approval of Parliament. That Act however explicitly provides for Parliamentary control over certain prerogative acts under the EU treaties, including Article 49 on Treaty revision. But notably, the statutory scheme of Parliamentary control of prerogative power does not extend to notifications under Article 50.

There has a been a long string of attempted challenges to the use of the prerogative power to extend EEC or EU powers, all of which have been rejected by the courts, sometimes in peremptory terms. However, when the prerogative is used to achieve "less Europe" in order to implement the decision of the British people which an Act of Parliament empowered them to take, it is suddenly found that there are implied

limitations on the prerogative power which prevent it being used for this purpose.

We welcome the decision of the government to appeal from this judgment. We hope that the Supreme Court will apply the law in a more orthodox and logical way, allowing the government to fulfil its promise to the British people to implement their clear decision.

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