INSIGHT

A Br-Exit Strategy: Questioning Dualism in the Decision *R (Miller) v. The Secretary of State* for Exiting the European Union

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ABSTRACT: The authors offer an alternative reading of the judgment *R (Miller) v. The Secretary of State for Exiting the European Union* focusing on the dualistic v. monistic dichotomy which permeates the High Court's reasoning. The authors argue that the Court strives for rendering a substantive reading of the relationship between the UK and the EU, while at the same time not ignoring the dualistic frame suggested by the Government's position. The overall result is twofold: the legalistic turn of the withdrawal and the UK still stuck at the crossroad between hard and soft Brexit.

KEYWORDS: dualism – monism – Art. 50 TEU – Brexit – UK constitutional law – EU rights.

I. Form, substance and EU rights

Many commentators discussed the constitutional issues raised by the *Miller* decision, taking advantage from the compendium of UK constitutional law included in some paragraphs of the judgment. Crown's prerogative powers to give notice for the UK to cease being a Member of the EU represent the core content of the *Miller* case. In both British and foreign *fora* on legal issues, comments addressed the decision focusing on the role of the Parliament, the functioning of the frame of government, the relationship between statute law (and Parliament sovereignty) and common law.[1] Those issues have been widely examined and the debate can be roughly summarized in a general praise for the High Court's

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[1] See G. Davies, *Representing the People vs Channelling Them: Constitutional Niceties in an Age of Instant Democratic Gratification*, in *European papers – European Forum*, *Highlight* of 14 November 2016, www.europeanpapers.eu, pp. 1263-1267.

careful balancing of constitutional values, deeply rooted in the British legal tradition.[2] British commentators in a way counterbalanced the reaction of the domestic press, stressing that the judges, far from preventing Brexit, simply encouraged parliamentary reflection and debate over a major constitutional change.[3] Some scholars argued that the decision highlights a sort of paradox with those opposing Brexit using the whole paraphernalia of English constitutional tradition to justify the need for stay in the EU and those who want to leave trying to trigger legal automatism from the referendum. That is to say: Europe supporters relying on arguments entirely founded on the domestic legal tradition (i.e. Parliamentary sovereignty) while eurosceptics advocating for a result which is at odds with both municipal constitutional history and legal culture.[4]

In any case, virtually any scholar addressed the *Miller* decision as a piece of the chronicle of what will be recorded as a pivotal moment in the UK constitutional (and political) history. Nonetheless, from a constitutional viewpoint what strikes the most in the decision is its struggle against anachronism when it comes to the relationship with international law. The *Miller* judgment initially addresses the interplay between the UK and the EU in dualistic terms except that it then strives for avoiding the 'divorce'[5] between legality and reality.

Starting from the beginning: the European Communities Act of 1972 (ECA 1972) is the means through which directly effective provisions of EU law are incorporated into English law. The interaction between the two legal orders is encapsulated within the classical dichotomy monism/dualism, with the Government suggesting the need to separate the international plane of the legal consequences of the membership to the Union and the domestic one.

The High Court's account of the three-fold classification of EU rights tries to make sense of the two planes, without fully adhering to the Government's logic. The taxonomy includes category (i) rights which are capable of replication in the domestic system; category (ii) rights enjoyed in other Member States of the EU; category (iii) rights which could not be replicated in UK law since they are inherently connected with the member-

[2] In the wake of the publication of this paper, the UK Supreme Court released the judgment of appeal of 24 January 2017 (*R (Miller) v. The Secretary of State for Exiting the European Union*, [2017] UKSC 5), confirming the High Court's decision. The Supreme Court specifically focused on the central argument discussed in the present paper that is the relationship between the UK and the EU in terms of interplay between domestic and supranational sources of law. The Lords clarified that the interplay between the two levels is dynamic, being the ECA the source of continuous and constant changes in the UK legal order. A glimpse of this argument, which is visible in the High Court's decision, is particularly addressed in our paper.

[3] A. Young, *R (Miller) v The Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin): Constitutional Adjudication – Reality over Legality?*, in *UK Constitutional Law Blog*, 9 November 2016, ukconstitutionallaw.org.

[4] G.F. Ferrari, *R (Miller) v. Secretary of State for Exiting the European Union: eterogenesi dei fini e populismo in una nuova pagina della storia britannica*, in *Dpce Online*, 6 November 2016, www.dpce.it.

[5] *Miller*, [2016] EWHC 2768 (Admin), cit., para. 66.

ship to the Union (right to stand for election to the European Parliament, right to vote, right to seek reference for preliminary ruling to the CJEU). According to the Court's opinion the withdrawal would affect all the three categories, with category (iii) being irremediably lost as direct effect of the expiration of the two years term from the notification under Art. 50. The only exception to this being the conclusion of an agreement pursuant to Art. 50, para. 3.

Categories (i) and (ii) need further clarification. The Secretary of State maintained that category (i) would survive under new primary legislation passed on the effect of securing those rights in the domestic system. On the contrary, the Secretary of State concedes that category (ii) rights would not survive the withdrawal. From the Government's viewpoint, this does not entail a violation of constitutional principles since this particular class of rights was recognised to British citizens by the ratification of the relevant EU Treaties by the Crown and the reciprocal ratification of the same Treaties by other Member States. As a consequence, the suppression of category (ii) rights does not require Parliament's intervention.

Now, the High Court considers the Government's position to be based on a formalistic account of the relationship between the UK and the international legal order of EU. The Court turns back to the ECA 1972 as the source of an international obligation in the domestic system. Here the dualistic logic gives way at least partially to substantive considerations of the EU as a peculiar legal order. The Act is able to provide the permanent source of British citizens' rights under EU law because the Parliament intended the ECA 1972 to be like that. In other words, the dualistic logic, which distinguishes between the international plane and the domestic effects of a given international obligation, fails to catch the peculiar nature of the EU. The Union is the source of multiple international obligations, some of which are provided with direct effect in the national legal system thanks to the "switching on bottom" of the ECA 1972.

This is the point in which the High Court seems to abandon the dualistic logic acknowledging the EU as supranational legal order, the legal implications of which cannot be oversimplified in the usual account of the relationship between the UK and the international legal order. The (substantive) constitutional nature of the ECA triggers parliamentary intervention and prevents the exercise of Crown's prerogative power in international relations. Monism peeps out from the reasoning when the Court clarifies that the ECA 1972 created legal changes in domestic law to a wide and profound extent.[6]

II. To be or not to be: questioning dualism

The Court's account of the relationship between the UK and the EU does not ignore the Government's dualistic understanding of the consequences of Brexit.

[6] *Ibid.*, para. 87.

Indeed, those are legally filtered through the lenses of the dualistic approach characterizing the UK. This is why judges may differentiate between the survival of the effects of self-executing EU norms on the one hand and that of non self-executing EU norms on the other.

The former effects are removed by the exit from the Union, while the latter may survive by means of national legislation conferring EU norms a freestanding domestic source.

The logic thread is the following: the ECA 1972 is the source of EU rights in the domestic system; the withdrawal from the Treaties according to the procedure set forth in Art. 50 TEU implies that the Act (*rectius* its section 2, para.1) is stripped of any practical effect. As a consequence, there will no longer be any enforceable EU rights in relation to which the provisions of the Act would have any application.

Now, the word "enforceable" clearly means that EU rights are no longer justiciable as far as their source is the ECA 1972. On this assumption the judges base the need for parliamentary intervention so not to let the Government deprive British citizens of their statutory rights without a Parliament's decision. The High Court repeatedly assumes that the decision to leave the EU will strip the effects of *any* EU law currently incorporated in the domestic system.

However, there is at least one hypothesis in which the effects of EU law cannot be excluded in the first place.

From the Court's reasoning it is not clear why self-executing EU acts (such as regulations) disciplining a subject-matter not covered by domestic legislation should be deprived of effects insofar Parliament decides not to intervene trumping the existing EU law. In this specific circumstance, EU law should at least remain in force, being repealed as soon as statute law covering the same subject-matter intervenes.

More intuitively, there is no reason to exclude that British citizens can still enjoy EU originated rights in the wake of the negotiation that is in the period between the triggering of Art. 50 and the end of negotiations. The ratification of the withdrawal agreement will then put an end to the UK membership to the Union. Up until then EU originated rights can be vindicated before British courts.

Nevertheless, the Court insists on the automatic loss of those rights as a consequence of triggering Art. 50. The conclusion can be explained by the choice of framing the relationship with the EU according to a rigidly dualistic logic, which implies that no space is left for EU law deprived of domestic sources of incorporation. This is the same logic that the Court is opposing in other parts of the judgment, relying on a more substantive reading of both domestic and supranational law.

Now, the need for parliamentary intervention is justified in light of the UK constitutional tradition but it is also compatible with (even if not logically triggered by) the formalism of the dualistic logic. Some scholars underlined the substantive nature of the High Court's reasoning, that is the preference of substantive arguments over form. This is testified by the fact that the Court approached the ECA as a constitutional statute,

thus justifying the enhancing of the requirement for interpreting it against a backdrop of constitutional principles. Moreover, the preference is clear from the close look taken to rights recognized under EU law as well as from their three-fold division.

This argument correctly underlines that the Court does reckon the reality of the EU framework, looking beyond the strict legality of the mechanisms triggering Art. 50. Nevertheless it fails to consider that the judges encapsulate this reality in the highly formalistic logic of dualism, ending up saying that triggering Art. 50 *automatically* means that rights are *entirely* lost.[7] In other words, the High Court discusses Art. 50 and the concrete consequences of leaving the EU and in doing so it offers a constitutional reading of the case. The judges then put those consequences within the frame of the dualistic model: the result is the legal impracticability to recognise the effects of all EU acts – including those provided with direct applicability within the pre-Brexit regime.

III. The Court and the dualisms of a separation process

The remarks that have just been made show the effort operated by the High Court to give an interpretation of the English constitutional law that could suit the historical circumstances. However, a thoughtful reading of the text shows how the attempt is only partially successful.

Surely, the judgment effectively confirms one of the main elements that characterize the British constitutional law, namely the sovereignty of Parliament, repeatedly invoked by the Court. Nevertheless, the dialectics between form and substance, and between monism and dualism do not seem to be fully solved.

As for the relationship between monistic and dualistic approach, the judgment shows in fact a variable approach. Areas in which the dualistic approach seems to prevail are copious: in the field of the division of functions between the Government and Parliament in the stipulation of ordinary treaties,[8] the effectiveness of the latter[9] and the conduct of international relations;[10] concerning the supremacy of the *Crown in Parliament*;[11] where the stages of the UK's accession process to the European Communities are reconstructed, as well as the process through which the Union's primary law has developed.[12] On the contrary, the monistic approach prevails where the dynamics of the relationship between the UK and the EU are reconstructed,[13] where the rights deriv-

[7] See M. Elliot, H.J. Hooper, *Critical reflections on the High Court's judgment in R (Miller) v Secretary of State for Exiting the European Union*, in *UK Constitutional Law Blog*, 7 November 2016, ukconstitutionallaw.org.

[8] *Miller*, [2016] EWHC 2768 (Admin), para. 32.

[9] *Ibid.*, para. 33.

[10] *Ibid.*, para. 89.

[11] *Ibid.*, para. 20.

[12] *Ibid.*, paras 41, 42, 44, 46.

[13] *Ibid.*, para. 65.

ing from the participation of the UK to the Union are considered,[14] where the Court analyses a path of separation from an international organization to a political integration project,[15] and finally where the rights belonging to UK citizens residing in other EU Countries are discussed.[16]

As for the dialectic between form and substance, the Court gives prevalence to the second. It is, as it has been said, the core of the argument developed by the reasoning of *Miller*, which carefully verifies the consequences on citizens' rights of the UK withdrawal from the Union, even beyond the respect of the forms referred to by the Government. However, even in this respect there are important issues that are not completely solved. First of all, when it comes to the account of the historical development of the relationship between the parliament and the government. The Court starts with the glorious revolution, which is recalled in the words of Lord Browne-Wilkiinson: "The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as sovereign body".[17] However, an analysis devoted to substantial aspects should also consider the bond that exists between rights, the role of Parliament and the elective nature of the legislative body.

In fact, at the heart of these dialectics, which the High Court has faced but not completely resolved, there is a deeper conflict. This is the difficult compatibility of a constitutional material – that of the UK – built on the basis of a long historical process of sedimentation, with a supranational integration path, developed in the historically short period of half a century long.[18] On the one hand, the UK frame of government is anchored to a dualistic approach in international relations. The proof is the diaphragm against the ECHR which has been set up by the Human Rights Act of 1998.[19] On the other hand, since the Sixties, the European system has been based on the principle of the *primauté* of EU law and assumed that the relationships between EU institution and Member States had a clearly monistic vocation (as it is manifestly clear from the *Simmenthal* mandate).

[14] *Ibid.*, para. 66.

[15] *Ibid.*, para. 91.

[16] *Ibid.*, para. 94.

[17] UK House of Lords, judgment of 5 April 1995, *R. v. Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513, 552E.

[18] In order to frame convincingly this conflict, in the recent ruling of appeal (on 24th of January) the Supreme Court has articulated a different reasoning: it moves the impact of the separation process on citizens' rights to the background and deprived it of its contents of values. On the contrary, the Supreme Court opts for a careful approach focused on legal formalism and emphasizes the constitutional role of the ACT1972 in the context of the system of the sources of law (see: UK Supreme Court, *R (Miller) v. The Secretary of State for Exiting the European Union*, cit., paras 77-93).

[19] As it is well-known, in order to ensure the application of the ECHR the UK Parliament incorporated it with the Human Rights Act of 1998, instead of granting direct effect to the Convention itself.

The separation process chosen by the citizens of the UK emphasizes this contrast, both for reasons of context, and especially as a result of the rules set out by Art. 50 TEU. In particular, these rules abolish the need to reach an agreement in order to govern the withdrawal process. As a consequence, an agreement is possible but not necessary. In its absence, two years after a notice given pursuant to Art. 50, the separation becomes complete and effective. Furthermore, the process set forth by Art. 50 does not allow to keep the national and European level separated. On the contrary, Art. 50 specifically refers to domestic constitutional law. As a result, from the point of view of EU law, the validity of the withdrawal process depends on the strict observance of the domestic constitutional requirements. At the same time, the interpretation of the internal constitutional rules must not ignore the dynamics of the separation process, as governed by Art. 50 TEU. It is a tangle difficult to solve, doomed to exacerbate the withdrawal process. Against this factual background, the Court tried to define a satisfactory balance, without being able to reconcile the two parts of a separation process.

IV. A fourth category of rights?

The taxonomy of EU originated rights is complete; nevertheless, there may be another category which is correctly not mentioned by the Court because of its judicial origin and (possibly) ephemeral nature. A fourth category of rights: those that have been recognised or reframed against the backdrop of a European principle or/and human rights norm.

The clearest example is the British courts recent case law on the right to private and family life and right to protection of data. In two cases *Benkharbouche*[20] and *Vidal-Hall*,[21] both dated 2015, the Court of Appeal held that some provisions of the Charter of fundamental rights (and specifically Arts 7, 8 and 47) have horizontal direct effect. As a consequence, UK legislation, which was held to be in violation of the Charter, was set aside. The conclusion was not required under CJEU's case law, even if the Court of Luxemburg does not exclude in principle such kind of effects.[22] The Court of Appeal's reasoning goes as follows: the Parliament's understanding of the provisions of Directive

[20] Court of Appeal, judgment of 5 February 2015, *Benkharbouche v Sudan Embassy* [2015] EWCA Civ 33.

[21] Court of Appeal, judgment of 27 March 2015, *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

[22] See Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de mediation sociale v. Union locale des syndacats CGT*, in which the Court excludes horizontal effects as far as Art. 27 of the Charter of Fundamental Rights of the European Union is concerned because the provision lacks specific expression in European Union or national law (see para. 45). In the same case, Advocate general Cruz Villalón argued that Charter provisions are in principle capable of producing horizontal effects: see Opinion of AG Cruz Villalón delivered on 18 July 2013, case C-176/12, *Association de mediation sociale v. Union locale des syndacats CGT*, para. 24.

95/46/EC,[23] as incorporated into the Data Protection Act 1998, does not conform with the correct interpretation of the aforementioned Directive in light of Arts 7 and 8 of the Charter. Therefore, EU law require the disapplication of domestic law. The rights originally conferred by the Directive (and specifically the right to damages for distress) and replicated into the domestic system by means of primary legislation are reframed through the disapplication of national law and the granting of horizontal effects to some provisions of the Charter.

The missing part of the *Miller* catalogue is thus the category of rights reframed or introduced by means of judicial interpretation. The triggering of Art. 50 and the possible conclusion of a withdrawal agreement will legally prevent the conclusion reached by the Court of Appeal in the aforementioned cases. Nevertheless, what the theory of the sources of law will not be capable of doing may be within the possibilities of the theory of interpretation.

In other words, it will not be possible to exclude the substantive persisting influence of EU human rights standards in the interpretation of national legislation, irrespective of the absence of the preliminary reference mechanism. For sure, dualism cannot shield the UK legal system from this kind of informal 'fertilization'.[24]

Even from this viewpoint the Government's understanding of the separation between the international plane – where the Executive conducts its business – and the domestic system is both anachronistic and divorced from reality.

V. Concluding remarks

The considerations that have taken place in the preceding paragraphs show how complex is disassembling an integration process, once it has reached a late stage of advancement. Likewise, the use of legal analysis categories – starting with dualism and monism in international relations – eventually proves to be unsatisfying, while the exaltation of substantive arguments paves the way to reflections whose final outcome is particularly uncertain. In other words, two distinct needs collide: the opportunity to adopt a substantive approach that accounts for the complexity of the relations between EU and UK on the one hand, and the necessity to frame the separation processes in strict legal formulations to give order to a process that is difficult to govern and whose results appear fundamentally uncertain on the other. At the same time, these needs are

[23] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[24] It is possible to envisage a glimpse of this intuition in the reasoning of the Miller case when the Court include the right to seek a preliminary reference within category (ii) rights, which are lost as a consequence of the withdrawal (see paras 66 and 66).

shaped by the dialectic between two different attitudes: the one that underlies Art. 50 and the one that permeates the process that started from the EU referendum result.

This does not fail to affect the way in which the withdrawal process can be pursued. In fact, the difficulties of holding together the substantive perspective with the stiffness that comes from the clash between UK frame of government and the procedure set out by Art. 50 does not leave much room for a prior negotiation, in the political sphere, between EU and UK. As a consequence, on the basis of the *Miller* ruling, only two workable alternatives arise: a) the renunciation to follow up the referendum outcome or b) the parliamentary approval of a bill that – from a factual point of view – completely repeals the ECA 1972, with effect from the moment the Government gives the notice under Art. 50. In sum, beyond the intentions of the different players, the High Court ruling has made it harder the process to give the withdrawal notice, but at the same time made it easier that the final result will be a *Hard Brexit*, as HM Prime Minister recently promised.