

(レジュメ、2017年4月8日)

Brexit とイギリス憲法

—2017年ミラー事件の最高裁判決に触れて—

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はじめに

- (1) 2015年EUレファレンダム法 (国民投票法 European Union Referendum Act 2015) —翌年2016年6月23日の国民投票
- (2) ミラー事件 (2016年11月3日一審判決) : *R(on the application of Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768—高等法院合議法廷判決
- (3) ミラー事件 (2017年1月24日最高裁判決) *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5—

問題点—議会主権 v レファレンダム

—議会主権 v 国王大権

—議会主権とEU法の優位性の相克：議会主権のダイシー伝統に変容をもたらす画期的な判決の登場：最高裁、1990年の *Factortame* 事件貴族院判決への若干の言及、But, それ以降の判例の発展へ及ぼす影響は？

EU (離脱通告) 法案 (いわゆる Brexit Bill) による授権

一、ミラー事件の一審判決と最高裁判決

《一審事実概要》

1972年ECAの制定—レファレンダムの結果、EUからの離脱回答多数—政府「EU加盟に終止符を打つため2017年3月末までに離脱通告を出す、と宣言。

《一審争点》

EU離脱担当大臣に対してジーナ・ミラー 及びデア・ドス・サントス (claimants) らが、政府には、議会に事前の承認なく、国王大権の行使によってTEU50条に基づき、EUからの離脱決定を通告する権限はないとして、高等法院に訴えを提起。これに対し、大臣は権限ありと反論。

《一審判旨》

(1) 審理の結果、「本件は純粹に法の問題にかかわっており、当法廷はEUから離脱することの功罪に関心はなく、またそれに対して見解を述べることもない。それは政治的問題だからである」としたうえで、「政府(defendant)の主張は、1972年E C Aのなかで議会によって用いられた文言にも、議会主権という基本的な憲法原理にも反しており」、さらに、「国王大権の行使によって国王側に50条に基づく離脱通告し、それにより国内法に変更をもたらす如何なる権限もない。」と、大臣敗訴を判示。

2. 《最高裁判決》

大臣は一審の判決を不服として最高裁に上訴。これに対して、最高裁は一審判決を8対3で支持し、政府の上訴を棄却。以下は多数意見による判決の骨子：

- (1) 昨年のレファレンダム（国民投票）で Brexit を支持。しかし、それは法的主権者である議会を拘束しない。
- (2) 1972年E C Aはイギリスを時のE E Cに加盟させ、EU法をイギリスの法源にするプロセスを創出した。
- (3) E C Aが効力を維持している限り、EU法は連合王国の法制度の“独立、かつ、すべての国内法に優位する”ことを意味する。
- (4) 議会がこれと異なる立場をとらない限り、そのことは維持される。
- (5) EUからの離脱はイギリスの憲法体制へ根本的な変更をもたらす、なぜなら、それはEU法の法源を断ち切るからである。
- (6) イギリスの憲法によれば、かかる変更は議会制定法によってのみなされることを要求する。
- (7) 大臣の国王大権行使によりEUからの一方的な離脱はイギリスの居住者の既存の権利を除去することになり、事前の議会による制定法による承認なしに大臣がEU諸条約から脱退するのを認めることはできない。
- (8) なお、最高裁では、スコットランド、ウェールズ、及び北アイルランドより、制定法上地方分権化されている立場から、諮問ないし同意なく大臣が一方的に離脱通告はできないのではないかとの主張がなされた。しかし、EUからの離脱の判断は、分権化された立法部にはなく、EUからのイギリスの決定に拒否権をもつものではない。

二. 議会主権と国民投票及び国王大権の関係

1. レファレンダムー新しいイギリス憲法の特徴

- (2) 2016年6月23日にだされた国民投票の結果は議会を拘束するか。

2. 議会主権と国王大権の関係

- (1) 1972年ECAから導く多数意見と反対意見

- (2) 国王大権の沿革。

- (3) 国王の条約締結権は、同時に、もう一つの命題、すなわち大臣はイギリス法を変更できないという原則、と一致していなければならない。

むすびに替えて

1. ミラー事件の最高裁判決の意味。

2. 政府白書「UKのEUからの離脱とEUとのあらたなパートナーシップ」

- (1) 3つのカテゴリーの諸権利の取り扱い（最高裁判例でも指摘）：

(a) 第一のカテゴリーに入る権利：

(b) 第二のカテゴリーに入る権利：

(c) 第三のカテゴリーに入る権利：

- (2) イギリス自身の法への抑制を取り戻し、CJEUの管轄権からの離脱

- (3). 連合王国の強化ースコットランド、ウェールズ、北アイルランド及びイングランドのすべての領域の連帯強化。

3. Brexit法案の審議で上院より出された修正案。

(資料)



Hilary Term
[2017] UKSC 5

On appeals from: [2016] EWHC 2768 (Admin) and [2016] NIQB 85

JUDGMENT

**R (on the application of Miller and another)
(Respondents) v Secretary of State for Exiting the
European Union (Appellant)**

**REFERENCE by the Attorney General for Northern
Ireland - In the matter of an application by Agnew and
others for Judicial Review**

**REFERENCE by the Court of Appeal (Northern Ireland)
- In the matter of an application by Raymond McCord
for Judicial Review**

before

**Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Clarke
Lord Wilson
Lord Sumption
Lord Reed
Lord Carnwath
Lord Hughes
Lord Hodge**

JUDGMENT GIVEN ON

24 January 2017

Heard on 5, 6, 7 and 8 December 2016

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The Lisbon Treaty
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Treaties
Treaty of Nice
Treaty of Amsterdam
Treaty of Maastricht
Single European Act

Article 50

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.


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European Communities Act 1972

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Changes to legislation: European Communities Act 1972 is up to date with all changes known to be in force on or before 03 April 2017. There are changes that may be brought into force at a future date. 

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Part I General Provisions

1. Short title and interpretation.
2. General implementation of Treaties.
3. Decisions on, and proof of, Treaties and EU instruments etc.



Part II Amendment of Law

4. General provision for repeal and amendment.
5. Customs duties.
6. The common agricultural policy.
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11. EU offences.
12. Furnishing of information to EU.

SCHEDULES

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SCHEDULE 2 Provisions as to Subordinate Legislation

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General implementation of Treaties

- (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.
- (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision—
 - (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
 - (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid. In this subsection " designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.

- (3) There shall be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the Bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment—
 - (a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and
 - (b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.
- (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.
- (5) The limitations on the legislative power of the Parliament of Northern Ireland which are imposed by section 4(1)(4) (treaty matters) of the Government of Ireland Act 1920 shall not be construed to prevent that Parliament, on matters otherwise within their powers, from enacting provisions for any of the purposes mentioned in subsection (2)(a) and (b) above; and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.
- (6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

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3 Decisions on, and proof of, Treaties and Community instruments etc.

- (1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).
- (2) Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.
- (3) Evidence of any instrument issued by a Community institution, including any judgment or order of the European Court, or of any document in the custody of a Community institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution;

and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.
- (4) Evidence of any Community instrument may also be given in any legal proceedings—
 - (a) by production of a copy purporting to be printed by the Queen's Printer;
 - (b) where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised so to do;

and any document purporting to be such a copy as is mentioned in paragraph (b) above of an instrument in the custody of a department shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department.
- (5) In any legal proceedings in Scotland evidence of any matter given in a manner authorised by this section shall be sufficient evidence of it.

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