

## 'Brexit': A rule of law consideration

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### *Introduction*

This brief discussion will relate to 'Brexit'. 'Brexit' is the commonly used term for the UK deciding to leave the European Union. This decision was made on the 23<sup>rd</sup> of June 2016 with 51.9%<sup>1</sup> of the voting population opting to leave the European Union. However, the big issue with 'Brexit' is how does one achieve it? How does one leave the European Union?

This will be attempted through an addressing of this question from the position of the rule of law, this is a process that should be legal not illegal. The rule of law is simply as is stated, it is the rule of the law. It ensures that every being is subject to the law no matter whatever their status, hence why a group of individuals could challenge the government as to their prerogative action to initiate the 'Brexit' process without consulting Parliament<sup>2</sup>.

### *What is the rule of law?*

To flesh out this explanation, the briefing paper published by the Bingham Centre for the Rule of Law gives the following principles;

'The law must be accessible and so far as possible, intelligible, clear, and predictable.

The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

The law must afford adequate protection of fundamental human rights<sup>3</sup>.'

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<sup>1</sup> "EU Referendum Results", BBC News, accessed 21<sup>st</sup> November 2016, [http://www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results)

<sup>2</sup> R. (on the application of Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)

<sup>3</sup> Bingham Centre for the Rule of Law, "Briefing Paper: Parliament and the Rule of Law in the Context of Brexit" (paper presented for the Bingham Centre for the Rule of Law, September 29, 2016)

Now identified, it is now important to analyse how these principles apply to Brexit

### *Accessibility*

The first principle given by the Bingham Centre is this idea of accessibility. Within the context of 'Brexit', this can mean several things. Should the EU laws concerning pregnancy rights, free movement of goods and environmental regulation become purely UK domestic law? Will UK citizens lose those rights and expectations under those laws? Should Parliament participate in the proceedings post-'Brexit'?

Vaughan Lowe poses that 'I think there is zero chance [that the] ... existing legal system affecting European nationals in this country will not change'<sup>4</sup>. Nevertheless, this article does not take that to be his position as surely the post-'Brexit' legal landscape should look very similar to that of pre-'Brexit' but with just more of a UK sovereign presence. This is clarified by Weller who comments that; 'internally, though not much might change on the surface, it will at the deepest spiritual level of European integration'<sup>5</sup>. Further to that point, Lowe has 'stressed that EU rights would fall away unless specifically protected under new British law'<sup>6</sup>.

In order to address this problem of whether to retain EU rights in the post-'Brexit' UK legal system, the DEEU must start at the point at which EU law directly became part of the UK legal system. Moreover, with this mind it has recently set about to repeal the European Communities Act 1972 (ECA 1972), the legislation responsible for enabling EU law to become part of UK law.

However, what of the accessibility of those rights granted under EU law? Saint Prix<sup>7</sup> would surely lose those pregnancy rights she attained where there no domestic law but only EU law to rely upon. This has been confronted by the DEEU when

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<sup>4</sup> "Zero chance EU citizens in UK will keep same rights post-Brexit, says expert", Lisa O'Carroll, accessed 2 October 2016, <https://www.theguardian.com/politics/2016/sep/13/zero-chance-eu-citizens-keep-same-rights-post-brexit-expert>

<sup>5</sup> Joseph Weller, "Brexit: No Happy Endings", *European Journal of International Law*, (2015) 26 (1): 1-7, accessed 21 November 2016, doi: 10.1093/ejil/chv017

<sup>6</sup> "Zero chance EU citizens in UK will keep same rights post-Brexit, says expert", Lisa O'Carroll, accessed 2 October 2016, <https://www.theguardian.com/politics/2016/sep/13/zero-chance-eu-citizens-keep-same-rights-post-brexit-expert>

<sup>7</sup> Saint Prix v Secretary of State for Work and Pensions [2014] All E.R. (EC) 987

discussing introducing a new Bill to repeal the ECA 1972, 'will convert existing EU law into domestic law'<sup>8</sup>.

This conclusion of this section may satisfy the accessibility principle in that EU and UK citizens will still hold the EU rights and expectations that many were worried about losing. However, what of the electorate who should be able to participate in these proceedings not only in the referendum to decide to leave but on what terms should the UK leave? This is covered in the next section.

### *Equality*

The second principle given by the Bingham Centre is that of the law should be equal and be non-discriminatory. If 'Brexit' is to be given effect into UK law, it is very hard to not to get drawn into the political theory about how to proceed, should one follow the government's prerogative or the democratic Parliament?

Increasingly though, this author is holding the view that the sheer notion of the government's initial position to utilise the prerogative within the 'Brexit' context is undemocratic and discriminatory. One may pose the question as to how a referendum which is a national consensus on a particular issue is undemocratic?

A referendum is an instrument that can be utilised by the Executive (Government) under a power called a royal prerogative (which is best to be thought of as a residual power left over by the Monarch that was transferred to the Government).

The argument against the use of this method with no consideration of Parliament is that of Gina Miller who is contesting that before any further steps are taken in 'Brexit', Parliament should have a say in the referendum outcome. As she states that 'the principle of parliamentary sovereignty underpins the constitution and the rule of law in the country'<sup>9</sup>. This statement is supported further by Grieve who supplements that;

'So in arguing that the UK should simply tear up our EU treaty obligations by using parliament to enact legislation in breach of them, the Brexiteers, including our lord

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<sup>8</sup> "Government announces end of European Communities Act", Gov.uk, accessed 4 October 2016, <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>

<sup>9</sup> "Brexit: High Court hearing challenge to Article 50 strategy", BBC News, accessed 13 October 2016, <http://www.bbc.co.uk/news/uk-politics-37639307>

chancellor, who takes a special oath to uphold the rule of law, are proposing something revolutionary and lawless'<sup>10</sup>.

Nevertheless, to argue that Parliament is sovereign under these circumstances is again, lawful and democratic. The referendum was a tool used as a consensus to see what the UK population wanted to do. The Government utilised this method to ensure that it could deliver the will of the people efficiently and effectively.

However, within the UK constitution, Parliament is the sovereign body so to all but exclude them is illegitimate, surely? The main thrust of this argument made from Gina Miller is that legislative action was required to enter into the European Union so surely there should be legislative action to leave it?

The guardians of the rule of law, the Judiciary against the representation of democracy, Parliament, is a little paradoxical? The rule of law surely represents democracy and democracy surely represents the rule of law. One must look to the 5<sup>th</sup> December 2016<sup>11</sup> when the Supreme Court meets to discuss these very issues.

### *Human Rights*

Omission was made on the question of whether the sovereignty argument is discriminatory as it is better suited to this section. This section concerns the third and final principle that the Bingham Centre propounded that of the rule of law involves the protection of human rights.

Within the context of 'Brexit', unless one is discussing the free movement of persons and some employment rights then the scope of this argument goes beyond that of the referendum outcome. Popular belief is held within the UK that the EU safeguards human rights under the European Convention of Human Rights 1950 (ECHR), this is however, misguided. It is The European Court of Human Rights that holds that particular role.

Despite not being particularly relevant to the plans of 'Brexit', the current Government are 'to replace the Human Rights Act with a so-called British Bill of

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<sup>10</sup> "Brexiters are proposing an illegal EU exit", Dominic Grieve, accessed 2 October 2016, <http://nuk-tnl-deck-prod-static.s3-eu-west-1.amazonaws.com/projects/64a08e5f1e6c39faeb90108c430eb120.html>

<sup>11</sup> "Brexit court ruling appeal date set for 5 December", BBC News, accessed 21 November 2016, <http://www.bbc.co.uk/news/uk-politics-37913911>

Rights<sup>12</sup> anyway. This is discriminatory in its own right going from a universal label such as “human” to an exclusive term such as “British” excludes a great deal of rights holders under the Human Rights Act 1998 (HRA) currently such as migrant workers, foreign students and immigrants who would not accrue rights under this new label. The effects of British Bill of Rights is unknown, however as is commented, ‘The Tories say they want a Bill of Rights specifically designed to fit British needs and traditions...so judges would be more likely to take into account British culture and history’<sup>13</sup>.

Although the ECHR is not particularly relevant at this moment in time to the ‘Brexit’ debate, the related ‘Brexit’ human rights abuses that have occurred since the result would come within the scope. Agerholm details that Brexit-related human rights abuses have seen that ‘More than a hundred incidents of racial abuse and hate crime have been reported since the UK voted to leave the European Union’<sup>14</sup>. With promoting a sovereign state, the government must be careful not to discriminate against others. Yet, this is exactly what has happened here in the context of ‘Brexit’.

Answering the point made earlier in the piece, the government action to utilise the prerogative with ‘Brexit’ has seen undemocratic principles and discrimination rise, everything the rule of law is against. Is the very nature of the Executive within the UK constitution a challenge to the rule of law?

### *Conclusion*

To answer this question, one must conclude that aligning with the view that the government’s decision to unilaterally undertake ‘Brexit’ is a challenge to the rule of law as the rule of law is legality. One cannot achieve a legal process with illegitimate practices, the democratic body must be entertained. A referendum is a public process but again does not grant the government absolute power to complete this

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<sup>12</sup> “Plans to replace Human Rights Act with British Bill of Rights will go ahead, Justice Secretary confirms”, Jon Stone, accessed 3 October 2016, <http://www.independent.co.uk/news/uk/politics/scrapped-human-rights-act-british-bill-of-rights-theresa-may-justice-secretary-liz-truss-a7204256.html>

<sup>13</sup> “Human Rights Act versus a British Bill of Rights”, BBC Newsbeat, accessed 21 November 2016, <http://www.bbc.co.uk/newsbeat/article/32692758/human-rights-act-versus-a-british-bill-of-rights>

<sup>14</sup> “Brexit: Wave of hate crime and racial abuse reported following EU referendum”, Harriet Agerholm, accessed 3 October 2016, <http://www.independent.co.uk/news/uk/home-news/brexit-eu-referendum-racial-racism-abuse-hate-crime-reported-latest-leave-immigration-a7104191.html>

process without consulting the public on how they are going to achieve it, this is no half measure.

This 'Brexit' process must be accessible, equal and must respect human rights. One must look to the wisdom and considerations of the judiciary on the 5<sup>th</sup> December 2016 to see on how they will adjudicate this case.

## References

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