BREXIT, PRESIDENTIAL EXECUTIVE ORDERS AND THE RULE OF LAW – A DISCUSSION ON THE LIMITS OF EXECUTIVE POWER

Introduction

Since that fateful referendum in the UK on 23rd June last year, I have been asked to talk about Brexit in several different locations and on several different occasions. But none as agreeable as Vancouver and none better timed than enabling me to get away from London on an over-crowded holiday week.[1]

What are we here to talk about? Is it Brexit (specifically perhaps the recent high-profile *Miller* case in the UK Supreme Court)? Is it Presidential Executive Orders (including possibly other concerns about the recent use of Presidential power)? Or is it about making the Executive more accountable?

I wonder if it isn't perhaps about something even wider. Like democracy, the rule of law is a comforting-sounding concept. We feel safer in a country, like Canada, like the USA, like the United Kingdom, where these axioms are taken for granted.

As Euclid observed, you cannot question an axiom. Or, as the British comedian Eric Morecambe used to quip *'you can't say more than that'.*

But what do we mean when we talk about the rule of law? We may all talk about the same thing, but have we yet agreed what it is we are talking about? Can the rule of law, like the famous scientific observer-effect doctrine, change in the eye of the beholder? I believe it can. In the short time I have I want to say a few words about: (i) the different aspects of the rule of law as a legal concept, (ii) how some of these aspects played into the *Miller* case, and (iii) the reality of executive power in the UK given that - unlike most western liberal democracies - we have no written constitution, but we do have the rule of law.

The rule of law

It is perhaps fair to observe that the rule of law has never been defined. Previous attempts to hug the concept have been vague in the extreme. Consider, for example, Professor John Finnis' definition of the rule of law as *'the name commonly given to the state of affairs in which a legal*

[1] These words were written before the disastrous British Airways systems-crash at Heathrow. Their unintended irony will not be lost on those listening to this talk.

system is legally in good shape.' Or this, from Professor Jeremy Waldron on the use of the phrase by different sides in the *Bush v. Gore* lawsuit as really meaning: *'Hooray for our side!'*

The closest anyone has got to the nirvana of precise definition is the late Lord Bingham in his excellent work *The Rule of Law*. In this magisterial survey, he came up with a number of 'rules' as to the content of the rule of law. They included: (i) the requirement that the law must be accessible, intelligible, clear and predictable; (ii) legal liability and rights ought not to be governed by discretion but, rather, by application of the law; (iii) law should be applied equally to all, save where objective differences justify differentiation; (iv) the law must afford adequate protection of fundamental human rights; (v) legal disputes must be capable of being resolved without prohibitive cost or inordinate delay; (vi) powers must be exercised reasonably, in good faith and within the limits of the power; (vii) adjudicative procedures provided by the State should be fair; finally (viii) the State must comply with its obligations under international law.

Now, my purpose in outlining this template is not in any way to question the wisdom of Lord Bingham's choices but, rather, to make three points. First, I suggest that his selection contains a necessary assumption or premise as to what the rule of law may legitimately comprise within its content. Secondly, I suggest that, even if Lord Bingham's content were to be agreed by all, its application would raise important issues. Thirdly, and leading on from this (a subject I will leave to Part 3 of this talk), I suggest that the rule of law is ultimately reducible to a power-concept and that its real significance and function is to act as a curb on uncontrolled executive power.

It seems to me that Lord Bingham's chosen categories assume not merely a 'thin' idea of the rule of law but also a 'thick' idea of what it contains. What do I mean by 'thin' and 'thick'? Well, there are two broad ideas of the proper scope of the rule of law. The first notion is a formalist or 'thin' theory. Under this concept, the rule of law requires that laws must merely comply with certain formal rules in order to be valid. This is irrespective of their content. Thus, a murderous and repressive regime could meet the rule of law under this head.

The second theory of the rule of law is a substantive or 'thick' theory. Under this version of the rule of law, judges would assess the content as well as the form of 'law' requiring substantive rights to be recognised.

It will be readily apparent that Lord Bingham's chosen categories contain a mixture of 'thin' and 'thick' rule of law elements. Thus, for example, the requirement that a law must be accessible and intelligible is a part of a 'thin' version of the rule of law. It is important but it

tells us nothing about the content of the law. By contrast, Lord Bingham's last category, that a State must comply with its obligations under international law is, plainly, part of a 'thick' version of the rule of law. Under this version, a State could not pass a law the content of which violated its international law obligations.

The difference between a 'thin' and a 'thick' version of the rule of law is by no means academic. In his wonderful book *Defying Hitler* Sebastian Haffner reveals how Hitler's persecution of the Jews in the years leading to 1939 was initially effected by laws meticulously and precisely drafted so as to achieve their intended effects.

Even in more modern times, I can disclose that in meetings with a previous Lord Chancellor we discussed possible domestic legislation that would conflict with provisions of the European Convention on Human Rights. In the United Kingdom the Lord Chancellor takes an oath promising to comply with the rule of law. His view was that because international treaties were not binding in the United Kingdom unless incorporated into domestic law, he could ignore purely international obligations. That Lord Chancellor might have benefited from reading Lord Bingham's book or, I suppose, he might have disagreed with it and opted for a 'thin' version of the rule of law.

The important point is that there is no universal consensus even about the general scope of the rule of law as a juridical concept.

But even if there were, that would not remove the challenges intrinsic to arriving at a proper definition of the rule of law. This is because there is no obvious societal consensus as to those elements of even a 'thick' version of the rule of law that should appear in our laws. Nowhere is this clearer than in protection of fundamental rights.

Let us agree (though the drafters of the Australian Constitution did not consider it necessary) that protecting fundamental rights is a necessary element of the rule of law. The question then arises – who decides? The fundamental rights case-law of the United Kingdom is replete with case-law in which judges overturn laws (or at least declare laws to be Convention-incompatible). Parliament may have drafted the laws but the judges interpret them. When these kinds of conflict arise, politicians complain that judges are illegitimately entering into the political arena. They claim a democratic mandate and that judges, being unelected, ought not in substance to strike down laws passed by an elected Parliament. And of course, society includes the people who may (as we shall see in the Brexit case) make claims to have a say in what laws are passed and how they are passed.

It is at this stage that ideas about the rule of law start to shade into politics. The question arises, there may be something called a rule of law but who decides exactly what it is. At this stage the rule of law may morph a political concept and this is something I want to address in the last part of this talk.

Miller and the rule of law

I will not go into why the British Government decided to hold a referendum into whether the United Kingdom should remain a member-state of the European Union. Suffice it to say that the reasons were, in my view, more to do with internal dissension within the Conservative party than to any principled desire to leave this major constitutional issue to the British public.

Indeed, I would go further and suggest that continued membership of the EU was so low on the radar of the electorate that it became a constitutional issue only after the referendum result was known. The then Prime Minister David Cameron had not supposed for one moment that he would lose the referendum. He had only offered it in the first place because it seemed an easy way out of his internal political problems and because he never expected to have a majority after the 2015 general election. At best, so he reasoned, there would be a coalition and he could use resistance to a referendum by his junior coalition partners the Liberal Democrats to justify breaking his referendum manifesto commitment.

However, when on June 24th 2016 the vote for Brexit was known it created enormous constitutional turmoil. That turmoil brought with it fundamental constitutional questions that had never been thought about. And with those questions (in fact precisely because of those questions) came a constitutional firestorm.

Most, if not all, constitutional questions are at root about executive power and Brexit is no exception. David Cameron had promised that the vote of the British people would be decisive as to whether the United Kingdom stayed in or left the EU. Yet, as a matter of well-established constitutional doctrine, it was a promise he was not entitled to give. This is because we live in a representative democracy and not a popular democracy. Put another way, Parliament and not the executive makes the law and there was nothing in the European Union Referendum Act 2015 to say (as other referendum legislation had said) that the result of the referendum in any way bound Parliament. There was an additional complication in that half of the constituent parts of the United Kingdom (Scotland and Northern Ireland) had voted in favour of remaining in the EU. Although only the Westminster Parliament has unlimited sovereignty there was a political cauldron brewing as far as the devolved assemblies were concerned in that Scotland

and Northern Ireland considered that their governments also possessed sovereignty and could not be forced to leave the EU against their will.

So, on the date of the Brexit vote there were at least four competing power-players: (i) the executive, (ii) the Westminster Parliament, (iii) the devolved assemblies, and finally (iv) the people. Each of these 'players' was to have arguments advanced on their behalf in *Miller*. Yet the storm when it erupted came, like many storms, from a most unexpected direction.

I doubt if most people in the UK, including their government, had ever heard of Article 50 of the Lisbon treaty. Yet it was to surface with a vengeance very soon after the Brexit vote and embroil all the different players in different ways.

Put shortly, Article 50 was the only prescribed route for exiting the EU. It permitted a Member State wishing to exit to notify the EU of its intention to do so *'in accordance with its own constitutional requirements.'* Its wording was deliberately opaque. No one had ever used Article 50 before. Lord Kerr, who drafted it, said that he did not know what it meant as it had never been intended to use it.

What became clear is that the negotiating process was heavily weighted in favour of the (now) 27 remaining States. But that was down the line because what was also unclear was who triggered Article 50 and whether or not the process could be stopped once begun.

The reason why *Miller* is the most important constitutional case for several hundred years is because the UK, compelled by the wording of Article 50 to examine its own constitutional requirements, suddenly discovered that it had absolutely no idea what they were.

Treaty-making and withdrawal from treaties once made were, traditionally, within the remit of executive government in exercise of prerogative powers; that is powers originally vested in the Crown and lacking any statutory underpinning. On the other hand, the effect of an exercise of prerogative powers in the context of pulling out of the EU would, necessarily, affect huge swathes of laws passed by Parliament. Many of those laws conferred rights. Moreover, the EU treaty was brought into domestic law by an Act of Parliament – the European Communities Act 1972. Withdrawal from the EU treaties would strip that legislation of any legitimate content. The devolution legislation giving devolved powers to Northern Ireland, Scotland and Wales was also predicated on the 1972 Act remaining in force.

So, the consequences of triggering Article 50 would not only affect a treaty entered into under executive power. It would also (to use familiar constitutional language) have the effect of dispensing with laws passed by Parliament.

With the benefit of hindsight, it might have been helpful if at least someone in the government had read Article 50 before the Brexit vote and before David Cameron had promised what he could not deliver. What was, nonetheless, assumed was that the executive in exercise of its treaty-making prerogative powers would be empowered to trigger withdrawal from the EU under Article 50.

Gina Miller, a well-heeled and public spirited citizen did not agree. She brought a case challenging the government's claim to use executive power to commence withdrawal. Although, before the case was heard, the academic consensus was that she would lose, in fact she won both in the first instance court (known as the Divisional Court headed by the Lord Chief Justice) and in the Supreme Court where the case was, uniquely, heard by all the justices.

It is beyond the scope of this talk to go into the detail of all the judgments. My purpose is, rather, to relate the decision to our central subject – the rule of law and the use of executive power.

On one level *Miller* may be seen as the rule of law in action. After all, the courts placed a curb on executive power by insisting that the executive seek legislative authority from Parliament to trigger Article 50. In a very loose sense that is consistent with the rule of law as relied on in cases such as *Entick v. Carrington* in which Lord Camden made it clear that not even the King could cause a search and seizure warrant to be issued in the absence of statutory authority. As he observed: *'[i]f this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of man so sacred that no man can set upon his neighbour's close without his leave…'.*

Yet it would be erroneous to view *Miller* as falling naturally into this category of case. In *Miller* the Supreme Court did not, in fact, claim to be curbing executive power but, rather, to be clarifying (and, it has to be said, not very clearly) some constitutional fundamentals.

The Supreme Court divided 8 to 3 in favour of upholding the lower court's verdict. But it did so on a rather strange basis. Acting for Wales I pressed arguments based upon the non-dispensing principle laid down in the seventeenth century *Proclamations Case*.

There Sir Edward Coke held that:

> *… the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm*.

The principle also appears in the Bill of Rights in 1688:

> *[The] Lords Spirituall and Temporall and Commons … Declare …*
>
> *That the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall*

However, (unlike the lower court) the majority judgment in the Supreme Court did not found its reasoning on this ancient constitutional principle. Instead, the President (Lord Neuberger) in a judgment with which 7 other justices agreed implicitly suggested that the issues in *Miller* were unique concerned, as they were, with EU law. The majority reasoning relied on a wholly new point not raised by any of the parties before the court, namely that EU law is a source of UK law. This conclusion was reached despite the fact that the majority also considered that the rule of recognition (the fundamental rule by reference to which all other rules are validated and which recognises statute and the common law as the source of UK law) remained unchanged by EU membership.

This was a very strange conclusion. Indeed, the majority was compelled by the internal tensions in its own reasoning to say that *'in one sense'* UK law in the form of the European Communities Act 1972 *'is the source of EU law'* because *'without that Act EU law would have no domestic status.'* Yet, so the reasoning proceeded, this was inadequately 'realistic' and it preferred the view that *'it is the institutions of the EU which are the relevant source of that law.'*

The minority reasoning (headed by Lord Reed) reached a correct conclusion as far as source of law was concerned, ruling that only the 1972 Act could be the relevant source of domestic law. He then construed the 1972 Act as encompassing withdrawal from the EU and found that whilst withdrawal from the EU altered its application it was not inconsistent with it.

In my view it would have been possible, and sensible, for the Supreme Court to have dismissed the government's appeal by reference to fundamental constitutional principle (the non-dispensing principle) which would have made *Miller* the modern equivalent of *the Proclamations case* and guaranteed its legacy to history.

That it chose not to do so is interesting in itself and relevant in part to what I now want to say in conclusion about the rule of law as a power concept.

The reality of executive power in the UK

We have seen how the rule of law, as a concept, lacks clear legal definition. I think that the only UK statute to refer to it by name is the Constitutional Reform Act 2005 which, by s. 1, provides that nothing in the Act shall adversely affect *'the existing constitutional principle of the rule of law'* or *'the Lord Chancellor's existing constitutional role in relation to that principle.'*

However, nothing in that or any other Act seeks to define what is meant by the rule of law. I have identified two possible meanings. One (though its content is not agreed) is the scope of certain procedural and/or substantive requirements of legislation. The second, and I have only really hinted at it up to now, is that it operates as a political or power-concept.

I think that many of our legal and constitutional axioms start to dissolve when you probe their logic and their history. The Crown held power for many years in England by virtue of a doctrine called 'the divine right of kings'. This was used to justify absolute royal power. But when Parliament gained control over the Crown it became necessary to fashion a new theory and so was born the doctrine of Parliamentary sovereignty which in its modern incarnation by the Victorian jurist A.V. Dicey came to mean that Parliament can make and unmake any laws whatsoever.

These doctrines are what I term 'power sustaining devices' and are deployed to justify claims to ultimate constitutional authority. I suggest, though I have not heard it stated, that the power-sustaining device for the judiciary in modern times is the doctrine of the rule of law. Like the divine right of Kings, like Parliamentary authority, it has no clear provenance or consensual definition. But repeated claims to it as an authoritative concept give it a legitimacy which stakes the judges' claim to constitutional supremacy. After all, if a law fails the test of conformity with the rule of law it will be the judges that make that decision and, through it, gain constitutional recognition as a higher source of authority than the executive.

At the same time, the ultimate current constitutional authority in the United Kingdom is Parliament. The judges interpret the law but Parliament is sovereign.

Or is it?

Relatively recently, the idea has been advanced that Parliamentary sovereignty is a construct of the common law and the assertion implicitly made that if Parliament were to legislate contrary to the rule of law the judges could and would intervene to preserve the rule of law.

Consider, for example, Lord Steyn in *the Parliament Act case* in 2005:

> *'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established under a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.*

These words coming from an eminent, albeit well-known liberal Law Lord are surprising enough. But they were echoed by another Law Lord in the same case. Lord Hope observed that the principle of Parliamentary sovereignty was *'created by the common law.'*

What we are witnessing here is a power-struggle. The abolition of judicial review by statute would contravene a 'thick' rule of law understanding and it would end judicial supremacy in the United Kingdom. The judges, in seeking to resist the executive creation of such a power balance would lay claim to a higher authority vested in them by the rule of law.

Common law constitutionalism versus executive (otherwise known as Parliamentary) sovereignty. Who would win in such a power clash? The executive would lay claim to a democratic mandate; the judges to protecting the rule of law.

It is not possible to predict the outcome. But the reality is that in modern times the judges are careful not to assert power directly over the executive. In his book *The Rule of Law* Lord Bingham makes clear that he fundamentally disagrees with Lord Steyn and Lord Hope (with whom he sat on the Parliament Act case). After citing with implicit approval Richard Elkins' critique of the idea that judges created Parliamentary sovereignty as *'un-argued and unsound'*, *'historically false'* and *'jurisprudentially absurd'* Lord Bingham points to the fact that common law constitutional supremacy would lead to unelected judges claiming enormous political power for themselves.

If we step back for a moment and recognise the subtle balance of power that lies at the heart of the United Kingdom constitutional settlement, it can be seen that real power lies neither in an all-sovereign Parliament nor in a judiciary imposing a supposedly normative but necessarily subjective value-system on the organs of government. There is a perpetual balance between the two with the executive being at one and the same time both master and servant of the courts and Parliament.

As Sir Stephen Sedley has convincingly said:

> *'Parliamentary sovereignty is not a given but is part of a historic compromise by which the counterpart of the common law's deference to Parliament as the single legislative power has been Parliament's recognition of the courts as the single adjudicative power. I have argued – unoriginally – in the past that the legislative and judicial arms of the state are each sovereign in their proper spheres, whereas the executive is answerable politically to Parliament and legally to the courts. This is why, for example, the courts may not call Parliamentary proceedings in question, and why Parliament will not call judicial decisions in question. It is also why, while Parliament may authoritatively decide what law the courts are to apply and how they are to go about applying it, its authority may intelligibly be said to be conditional on the courts' continued performance of their constitutional role of determining and enforcing legality. Laws without are as mischievous as courts without laws.'*

Although, therefore, we think in the United Kingdom of Parliament as the driving force of our informal constitutional arrangements and, within Parliament, of the executive as the true master, that is a misleading picture. None of the players in the United Kingdom constitution can afford to play their trump cards too often. But where a trump card falls to be played, it will (according to who is playing it) be that of Parliamentary sovereignty (Parliament's trump cared), that of possessing a democratic mandate (the executive) or that of the rule of law (the judges).

This brings me back to *Miller*. This was a case where any or all of our main constitutional players could have asserted superiority over the other. Lurking in the background, too, and sometimes in the foreground were the people; the silent majority who believed in Cameron's promises and who, so unused to really being listened to, imagined that they had a legal entitlement to see their Brexit wishes fulfilled at the earlies possible time.

Yet there were so many tensions over the politics of Brexit that, in fact, no-one voice claimed to have the ultimate power. The people had been allowed to vote and for once (a pattern soon to be repeated in the United States) they had voted against the liberal establishment. Few MPs wanted Brexit yet, if they were not to betray the rash promises they had given before the referendum, it was now the people who called the shots. Even strong 'remainers' accepted that there was no going back. Any reneging on the decisiveness of the vote would, I am sure, have led to civil war.

In that potential cauldron, as I view it, nothing in *Miller* touched directly on the rule of law. In such an uncertain climate it was hardly the time to bang the drum of constitutional fundamentals. Yet, once one understands the balance of power and the need to retain that balance of power with none of the players directly questioning the others' authority unless their own constitutional power was threatened, it can be seen that deep at the heart of *Miller* the UK courts were placing indirect reliance on the rule of law in its silent and tactful demonstration

that only after careful judicial analysis would the executive know whether, and how, it was entitled to act.

If the executive had triggered Article 50 in defiance of the courts there would have been a constitutional crisis. But if the courts had, as a matter of general principle, driven a hole in the executive's power to make and unmake treaties so, too, would there have been a constitutional crisis. As it was some of the tabloid media dubbed the judges 'Enemies of the People' for frustrating the immediate triggering of Article 50 by the government without waiting for Parliament.

In deciding *Miller* as it did the Supreme Court implicitly recognised that the different vested interests in the outcome meant that this was no time for false heroics. The Supreme Court played it safe and determined the issues on an extremely narrow basis, creating no wider constitutional precedent for the future.

In the end, the court's verdict was recognised and followed. That in itself may be regarded as a triumph for the rule of law which is at its most effective when it does not need to shout its identity from the rooftops.