Professor John Finnis | 26 October 2016

Terminating Treaty-based UK Rights

Judicial Power Project

Executive Summary

At the centre of the Brexit litigation is a fallacious argument that fundamental constitutional principle forbids the executive from terminating treaty-based rights.

The claimants maintain that rights under the EU Treaties, treaties and rights which are incorporated into British law by the European Communities Act 1972 (ECA), are *statutory rights enacted by Parliament*. The claimants argue that it follows that the executive is unable to terminate the UK's adherence to those Treaties without the authority of a new Act of Parliament.

But rights in EU law, enjoyed by persons in the UK because of the ECA, are *not* statutory rights enacted by Parliament. They are treaty-based rights, "statutory" in a weaker, narrower sense than the claimants need. The ECA incorporates EU law – gives it statutory force – just as it stands "from time to time" and this body of law and associated rights is constantly open to change in the international realm, by way of decisions by the EU or EU-related bodies, in which the Crown often participates.

All this is analogous to treaty-based UK rights under double-taxation agreements. The content of these agreements as they stand ("have effect" internationally) from time to time is incorporated into British law by statute. The legal rights in question are not statutory rights enacted by Parliament. Instead, Parliament gives effect to the position in international law. This means that the rights cease to have legal effect in the UK if the agreements expire or are cancelled by way of the Crown's prerogative to conduct foreign affairs.

Each double-tax agreement has provision for its own termination by executive action. It would be absurd to suggest that the executive has no authority to terminate or vary a double-taxation agreement without the authority of an Act of Parliament. The termination of treaty-based rights is possible by executive action in the international realm and involves no challenge to any Act of Parliament. Likewise, triggering article 50, and moving the UK towards withdrawal from the Treaties of the EU, is not forbidden by and does not challenge the ECA or any other statute.

Oral argument before the Court did not clearly illuminate these fundamental points about treaty-based rights. Triggering art. 50 does not involve the executive destroying statutory rights enacted by Parliament. Instead, as with exercising the prerogative to terminate a double-tax agreement, triggering art. 50 would be a lawful executive act, one that would begin a process of changing the UK's international obligations, a process which would in due course bring to an end some treaty-based rights in the UK.

The Court should reject the challenge to the Crown's legal authority to trigger art. 50.

Terminating Treaty-based UK Rights

Oral argument in the *Brexit Case* in the Administrative Court last week left an easy case looking a bit difficult.[1] It allowed Lord Pannick QC, for the lead claimant, to reiterate a couple of dozen times in his Reply, unchallenged, the glaringly fallacious syllogism on which he has rested the claim: (1) *statutory rights enacted by Parliament* cannot be destroyed (removed, defeated, etc.) by executive action without Parliamentary statute [or authorization];[2] (2) the myriad rights acquired by UK persons under the Treaties

[1] *Santos and M v Secretary of State for Exiting the European Union* CO/3281/2016; CO/3809/2016. Heard before the Lord Chief Justice, Master of the Rolls and Lord Justice Sales on 13 Oct & 17-18 Oct 2016. All references are to the transcripts publicly available at https://www.judiciary.gov.uk/publications/santos-and-m-v-secretary-of-state-for-exiting-the-european-union-transcripts/.

[2] A. "…notification will inevitably cause some statutory rights enacted by Parliament to be destroyed. It will take the preservation of other statutory rights out of the hands of Parliament." (Day 3: pp. 58-9)

B. "My submission is that just as the prerogative power cannot create domestic law rights or duties, so equally it cannot be used to defeat domestic law rights, by which I mean statutory rights." (3: 73)

C. "…what he [a Minister of the Crown] does on the international dimension cannot either create rights or remove rights already recognised in domestic law What is so exceptional about the present context is that the action which the minister is proposing to take on the international plane will have an inevitable destructive effect on statutory rights created by Parliament". (3: 75)

D. "I can think, and certainly no example has been given in court, of no other context where action on the international plane of itself defeats rights, statutory rights, created by Parliament." (3: 76)

E. "We say that the relevant constitutional principle is that where Parliament has created statutory rights, they cannot be removed by executive action, whether under the prerogative or by any other executive action. There is a need for Parliamentary authority." (3: 80)

F. "To use prerogative powers to remove rights created by Parliament is simply inconsistent with the fundamental principle of Parliamentary sovereignty." (3: 80)

given effect in the UK by s. 2(1) ECA 1972 are *statutory rights enacted by Parliament*; (3) therefore no executive action can be taken to terminate the UK's adherence to those Treaties without authorization by statute [or other parliamentary authorization].[3]

But rights acquired by virtue of s. 2(1) ECA are not "statutory rights *enacted by Parliament*". They are rights under the treaty law we call EU law, as it stands "from time

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G. "It would be remarkable indeed if the executive could remove statutory rights of importance in the absence of clear and express Parliamentary authorization." (3: 87)

H. "…it would be, in my submission, quite extraordinary if a minister, the executive, can defeat rights created by Parliament without express statutory authority." (3: 89)

I. "The true principle is that where, as here, Parliament has created statutory and constitutional rights, the minister has no power to destroy those rights, or any of them, through the use of the prerogative unless Parliament has clearly conferred on him a power to do so. That is the true principle." (3: 91-2) J. "One is concerned here with a case where executive action is proposed to be taken to defeat statutory rights." (3: 94)

K. "the issue is whether the executive may act to destroy statutory rights." (3: 100)

L. "my main submission, is that the executive cannot remove statutory rights unless they are clearly so authorised, unless the minister is clearly so authorised by Parliament." (3: 101)

M. "the question of whether there is, in law, any prerogative power to act so as to remove statutory rights. If, as we submit, there is no such power, the 2015 Act cannot assist the defendant." (3: 102)

N. "a minister, we submit, for the reasons I have given, cannot validly act to remove statutory rights, rights of a constitutional nature, without, we say, breaking the back of the constitution and crippling it." (3: 107)

O. "in any event in the context of the 1972 Act, Parliament has made very clear that by section 1(2) and section 1(3), that any alteration to the treaties which provide, of course, the substance of the section 2(1) rights, requires Parliamentary authority." (3: 107)

P. "I say there is nothing in any piece of legislation which clearly affects the principle that the Secretary of State needs statutory authorisation or gives him statutory authorisation to defeat statutory rights, nor does he contend that that is so." (3: 107)

Q. "The issue is whether executive action, through an Article 50(2) notification, will override, or set aside, legislation enacted by Parliament. If it does, that executive action is not permitted under the doctrine of Parliamentary sovereignty. (3: 115-6)

[3] The claim employs the syllogism without the bracketed dilution, but in argument Lord Pannick occasionally resorted to the diluted version – e.g. 3: 78 lines 1, 12.

to time". They are thus subjected to alteration by decisions made in the international realm by EU or EU-related bodies and processes, in which the Crown participates by exercise of its prerogative, for the most part without restraint or pre-authorization by Parliament, let alone by statute. So there are two necessary conditions for the existence, effect and operation of these treaty-based UK rights as rights – yes, "statutory rights" – in UK law. One is that they be rights from time to time created or arising by or under the Treaties. The other is the silent operation of s. 2(1) ECA. The latter necessary condition does not suffice to sustain them as treaty-based UK statutory rights if they cease to be in effect in or under the Treaties, by virtue of something done to or under the Treaties – often something done entirely without pre-authorization, or indeed any authorization, by the UK Parliament.

These treaty-based UK rights for which s. 2(1) ECA is a necessary condition are closely analogous to the treaty-based UK rights acquired under double-tax treaties, treaties given statutory effect in UK law as they have international effect from time to time. The analogy was approached in oral argument for the Government by James Eadie QC and in reply by Lord Pannick, and was left in some obscurity, an obscurity the latter had no incentive to dispel.

What precisely is it? ECA 1972 s. 2(1) gives effect in UK law to "all such rights… *from time to time* created or arising *by or under the Treaties*…". The Taxation (International and Other Provisions) Act [TIOPA] 2010 s. 2 (just like its substantially identical antecedents in 1988, 1970, 1952 and beyond)[4] gives effect "despite anything in any enactment", to any double tax treaty about which an Order in Council has declared (a) that the treaty makes arrangements for affording relief from double taxation and (b) "that it is expedient that those arrangements should have effect". The rights created by each of these two Acts are statutory in the broad sense that, in each case s. 2 of the statute is a necessary condition (one of two necessary conditions) for the rights' legal efficacy in the UK, but they are *non-statutory* in the precise sense that Parliament has *not enacted them*, and in many, most or all cases has given them efficacy contingently on their coming into effect and remaining in effect "from time to time" *as treaty-based UK rights*.

[4] See Income and Corporation Taxes Act 1988 s. 788(1), Income and Corporation Taxes Act 1970 s. 497(1), Income Tax Act 1952 s. 347(1).

What does this mean? It means that the content of the rights – the treaty-based UK rights – can be changed, and the rights even eliminated (destroyed, to use Lord Pannick's favoured term) without the slightest intervention by Parliament, let alone a statute. If Russia terminates the UK-Russia double tax agreement, the rights are destroyed. If the UK exercises its same power, under art. 29 of the UK-Russia double tax agreement, to terminate the agreement by 6 months' notice given "through diplomatic channels", the treaty is terminated and the arrangements it had made for avoiding double taxation of Russian and UK residents cease to be in effect, both internationally and as a matter of the UK law in and under ss. 2 and 6 of the 2010 Act. The rights that had existed under UK law – rights of great importance to all persons concerned – are destroyed.

Yet no one would or could plausibly suggest that a statute is required to authorize the UK Government to terminate the UK-Russia double tax treaty or any of the other similar treaties (about 140 of them). This all makes obvious the radical ambiguity of steps (1) and (2) in Lord Pannick's syllogism. Treaty-based rights are statutory in that they depend for their effect in UK law on Parliamentary enactment; but they are not statutory inasmuch as they are not themselves enacted by Parliament and can be terminated ("destroyed") by termination of treaties in the course of the Crown's dealings with foreign entities or states. Such termination fully respects the *Case of Proclamations*, the Bill of Rights prohibition and annulling of executive dispensation from or suspension of statutes, and any other established constitutional principle. Steps (2) and (3) of the syllogism are false.

There is in fact and law a fundamental asymmetry between the introduction of treaty-based rights, powers or obligations into UK law, and the termination of such rights. Introduction can only be by statute. The treaty is a necessary but not a sufficient basis; the other necessary condition is a statute. Termination, on the other hand, can be by executive action terminating the treaty. For the removal of one of the two necessary conditions is of itself sufficient to eliminate the right. The statute is a necessary condition for introduction, but is not sufficient to sustain it when the *other* (and independent) necessary condition – the treaty – disappears in the course of the UK's dealings with foreign entities (whether states or treaty-based entities such as the EU). (This all shows, incidentally, that the term "incorporation of a treaty by statute" is ambiguous, in essentially the same way as Lord Pannick's "statutory rights".)

Parliament has had sight of the termination provision (escape clause) present in all our double tax treaties, each treaty being scheduled to its country-specific Order in

Council, laid in draft before the Commons (as required by s. 5(2) TIOPA) prior to that House's address to Her Majesty to make the Order and thus bring into effect the international arrangement and the treaty-based UK rights thereby arising. Parliament has taken no steps to restrain or impose conditions on the simple, one-step diplomatic action sufficient to terminate the agreement, notwithstanding the great impact of such action on those "statutory rights".[5]

Similarly, Parliament had sight of art. 50 of the Treaty on European Union when by statute (s 2 European Union (Amendment) Act 2008) it added the Lisbon Treaty to the list of Treaties in s. 1 ECA 1972. In adding that Treaty it made various important exceptions and also made provisions about the use of UK executive powers in the conduct of EU affairs. But it did not except or make any other provisions about art. 50, either then or in the European Union Act 2011 which extended the restrictions imposed by Parliament in 2008 on UK ministerial actions capable of *extending* or altering EU treaty-based UK rights overriding common law and statutory rights of the kind that are genuinely the result of Parliamentary enactment. Parliament ratified art. 50, the new escape clause for unilaterally terminating the effect of the Treaties in a Member State.

How was this left in obscurity in court last week? After all, some of the main points made above, about double tax agreements, had been stated briefly in paras. 36-37 of the Government's Skeleton. But when asked about the relevance of the double tax treaties, counsel said nothing about either the close parallel between s. 2 ECA and s. 2 TIOPA, or the *termination* provisions in double tax agreements. Instead he talked about Parliament's (more properly, the lower House's) involvement in *renewal* or *replacement* of renegotiated tax treaties.[6] The true relevance of the double tax treaties

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[5] TIOPA s. 5(1) envisages but does not require the revoking of the relevant Order in Council, but significantly does so only in the context of making transitional provisions. It neither says nor implies that the arrangements and consequent rights survive the termination of the underlying treaty.

[6] 2: 147-8: "THE MASTER OF THE ROLLS: I just want to understand you how say that a double taxation agreement would serve to support the general argument that you are advancing [scil. that There isn't any broad, general proposition that steps on the international plane and the exercise of the prerogative are unlawful, if and to the extent that they either do or they might have an impact on domestic legal rights: 2: 145].

MR EADIE: My Lord, I think the answer to that is that the double taxation treaties do indeed involve – I think they involve a bespoke process by which you do have to go back to Parliament, but afterwards. Much of this – there is therefore a sequencing involved. What happens in terms of sequencing is that the

to the subject of this litigation thus disappeared from view. It was not brought back into the picture, whether by judicial questioning then nor by Lord Pannick in reply. He was doubtless grateful for the consequent non-appearance of the illuminating analogy – an analogy that had only to appear in focus for his step (1) to collapse, and with it his entire syllogism. He had in any case the delicate task, at that moment, of treating the approval of a draft Order in Council by one House as equivalent to a statute (so as to sustain his doubly extravagant claim that only a statute suffices to introduce "statutory rights" and only a statute suffices to destroy them). The Court did not disturb him in his legerdemain at this point. The entire discussion of double tax treaties between him and Sales LJ at 3: 78-80 is focused on the conditions for their ratification and for the changes in UK primary

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double taxation treaty is renegotiated or different provisions are arrived at. Then, as my Lord says [scil. at 2: 146], there is interposition into domestic law and Parliament reacts. But the fact of the matter is and the point is that the royal prerogative has been exercised to create, as it were, the new agreement, which if Parliament then said: we don't like that; which they would be constitutionally perfectly entitled to do because they are supreme, they do that afterwards.

THE MASTER OF THE ROLLS: Yes.

MR EADIE: So, as it were, it could just as much be said in that context as it could in ours, that there is preemption by the exercise of the prerogative right there, which is to renegotiate and enter into a new – double taxation or whatever it might be, agreement. It doesn't preclude Parliament from then saying: well, actually, we don't much like the look of it; nor does it necessarily preclude – maybe my Lord is right in terms of that specific context – Parliament having potentially necessarily to alter the domestic scheme to take account of that new arrangement~–

THE MASTER OF THE ROLLS: All I am saying is that all that shows, that particular example, is that a Parliamentary intervention – in order to give effect to what has been negotiated by the Crown and its prerogative power, in order to give effect to it, Parliamentary intervention is necessary and it is substantive. It is not simply: well, there is nothing else we can do; it is actually a substantive exercise of Parliamentary supervision. That is the point I am making.

MR EADIE: My Lord, yes. I don't mind that, if I can put it that way. For the purposes of my argument, I don't mind that because in that context, whether it intervenes substantively or not to alter things, the fact of the matter is that the prerogative has been exercised in that way. Now, that isn't an example of, as it were, having a direct and immediate impact on to domestic law; it is an example of the Crown exercising its power on the international plane to enter into an agreement which it then, as it were, presents to Parliament to say yes or no. If it says no, then the Crown has to go back and renegotiate, or put up with the fact that it would be in breach of its international obligations.

THE MASTER OF THE ROLLS: Yes.

legislation and rights consequent on a treaty's being *given effect*. A treaty's termination without replacement – the entire analogy with Brexit – remained (it seems) entirely unmentioned!

In sum: Lord Pannick's first premise, his grand constitutional principle, is falsified, in its ambiguous over-breadth, by the absurdity of maintaining that the UK cannot simply terminate a double tax agreement by executive action under the treaty's termination provision, independently of any parliamentary action let alone a statute. The symmetry between creation and termination of treaty-based UK rights, assumed by Lord Pannick and asserted by Helen Mountfield QC for some interested parties,[7] is falsified by the simple fact that, just as Parliament need have no role in the making of the treaties without which it cannot act to create treaty-based UK rights, so it need have no role in the unmaking of treaties whose unmaking, without more, *pro tanto* terminates such rights.

But what if the Government decided to terminate not just one or a few double-tax agreements, but all of them? Would that require pre-approval by a statute? No constitutional principle requires it.

What about Lord Pannick's fall-back, "Parliamentary pre-approval [short of a statute]"? He interpreted that, as we have seen, to include approval by one House of an Order in Council. On this sub-statutory spectrum of sufficient and allegedly necessary approval why not include a dedicated Act of Parliament for staging under Parliamentary supervision a national referendum on the question "Should the UK remain party to or terminate its existing double tax agreements?", ministers' Second Reading speeches assuring both Houses that the intent was to let the people, and not Parliament, decide the fate of all existing double tax agreements (and incidentally securing at each stage of the Bill majorities of over 5 to 1, with never a suggestion by anyone that Parliamentary pre-approval of the terminations would be required *after* the referendum's approval of such termination)? Inviting a court to draw a line on this spectrum is inviting it not to apply but to invent constitutional principle.

[7] 3: 130-1, 134, 136.

In considering the significance of Parliament's decision not to include art. 50 notifications within the scope of its imposition (in 2008 and 2011) of Parliamentary preconditions to executive action capable of affecting treaty-based UK rights, – preconditions of a kind that goes back at least as far as s. 6 European Parliamentary Elections Act 1978) – it is worth considering some of the import of art. 50 as a whole.

Art. 50 obviously provides a mechanism for the dissolution of the entire EU, or for the withdrawal from it of any number of member states. All that is required is a set of perhaps coordinated or more or less coincident notifications under art. 50(2), followed as promptly as desired by a corresponding set of withdrawal agreements each given qualified majority approval by the European Council under art. 50(2) and taking immediate effect under art. 50(3). The UK could (within a few weeks of the start of such a dissolution) be left as the only member of the EU, all without the slightest Parliamentary involvement, and with or without UK Government approval in the Council of any of these agreements. It is absurd to suggest that the UK Government would need statutory approval to make an art. 50(2) notification to and agreement with the rump European Council of which our Prime Minister was now the only voting member – so as to terminate the UK's relationship with the EU and with it our obligation to pay in perpetuity the salaries of that Council's two non-voting members (not to mention all the other running costs of the EU) and to terminate – destroy – the "constitutional" EU-based "statutory rights" of UK persons under s. 2(1) ECA.

That scenario merely dramatizes the fact that the making and unmaking of treaties – and of the rights that can if Parliament so enacts be derived from such treaties – is foreign affairs, a field in which decisions of great moment can and often should be made without requiring, under our constitution, any Parliamentary pre-authorization or advance approval by legislation. (And the scenario is scarcely more make-believe than the assumption on which the present litigation is curiously proceeding, that a notification under art. 50(2) is irrevocable.)

About the Author

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