legislative provisions that have no legal consequences, see Feldman (2016) 37 Stat.L.Rev. 212.)

C. Conclusion

The decision forced the Government to introduce to Parliament a Bill to authorise it to give notice under Article 50. Parliament duly passed the European Union (Notification of Withdrawal) Act 2017, and notice was given on 29 March 2017. The Act imposes no constraint on how ministers conduct the negotiations which follow, or on the outcome. The longer-term implications for constitutional law are less clear. If it transpires that the UK has a right to withdraw its notice should negotiations not produce results to its liking, no further Act would be needed to authorise the exercise of that right (since that would be consistent with the ECA as interpreted by the majority in *Miller*), but an Act might be needed to authorise the signing or ratification of any agreement which may be reached, as these steps would not have been authorised by the ECA or the 2017 Act. More generally, the majority's approach to statutory interpretation might be taken to allow unprecedented freedom for judges to read unjustifiable restrictions on governmental conduct of affairs into legislation. Professor Elliott argues, in his article in this volume, that an important, though undesirable, effect of *Miller* might be the recognition of an as yet incompletely conceptualised category of "substantial constitutional change", which could require authorisation by way of special constitutional legislation. Apart from that possibility, the future impact of *Miller* is likely to be limited to its own facts, which are unlikely to recur; but the majority's judgment is a reminder that constitutional adjudication in novel circumstances sometimes involves judges in rewriting important constitutional rules, under the impression that they are following orthodox principles; rules and principles may pull in different directions, and the consequences are unpredictable.

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UK GOVERNMENT CANNOT HIDE FROM COMPLICITY IN HUMAN RIGHTS ABUSES

IN the joined appeals of *Belhaj v Straw and Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3, the UK Supreme Court held that state immunity and the foreign act of state doctrine did not prevent claims against the British Government alleging complicity in human rights abuses and breaches of peremptory norms of international law.

The facts of each case reflected conduct "positively inimical to the rule of law" (at [167]). Mr. Belhaj, a Libyan national and former political opponent

of the Gaddafi regime, and his wife, Mrs. Boudchar, alleged that British officials assisted the United States of America in kidnapping, detaining and torturing them in Malaysia and Thailand, before taking them to Libya – on a US-registered jet that refuelled in Diego Garcia – to be detained and tortured by Libyan officials. Mrs. Boudchar was heavily pregnant at the time. Mr. Belhaj was detained and allegedly tortured in Libya for nearly six years. Mr. Rahmatullah, the respondent in the second appeal, was a Pakistani national detained by UK forces in Iraq before being transported to US custody. He was then transferred to Afghanistan and detained at Bagram Airbase without charge or trial for 10 years, where he is also alleged to have been tortured. The respondents brought tort claims against several government officials and departments alleging complicity in these abuses. The appellants argued that the claims were barred by state immunity as they indirectly impleaded the interests of foreign states, and/or because the foreign act of state doctrine applied.

Their Lordships gave short shrift to the state immunity argument. The foreign states were not indirectly impleaded because their "legal position" would not be affected by an English court's decision that they were the primary actors in the alleged tortious conduct committed by the appellants (at [31]). While such a determination might result in reputational damage, this would not be sufficient to amount to indirect impleading, nor did it constitute a legal interest. The appellants' argument to the contrary was in effect "an attempt to transform a personal immunity of states into a broader subject matter immunity" (at [196]). For Lord Mance, if the Court accepted the appellants' argument, then whenever states act in concert, they would be immune from judicial accountability: before domestic courts because the claims indirectly impleaded the other states, and before foreign courts because they could invoke immunity directly (at [30]).

Their Lordships were divided on both the conceptualisation of the foreign act of state doctrine and its application to the facts. Lords Mance, Neuberger (with whom Lord Wilson agreed) and Sumption (with whom Lord Hughes agreed) all gave detailed and wide-ranging judgments. In a brief paragraph, Lady Hale and Lord Clarke agreed with the reasoning of Lord Neuberger, thereby establishing his judgment as the *ratio* to the extent of any disagreement. In what is perhaps an overstatement, they also observed that Lords Mance and Neuberger had reached the same conclusions "for essentially the same reasons" (at [174]). In broad terms, Lords Mance, Neuberger and Sumption all drew a distinction between (1) rules that normally recognise and treat as valid legislation and executive acts of a foreign state within its jurisdiction; and (2) a common-law doctrine of non-justiciability or judicial abstention, pursuant to which an English court will not adjudicate upon certain sovereign acts committed by a foreign state abroad.

With respect to (1), Lords Mance and Neuberger distinguished between a rule requiring a foreign state's *legislation* to be recognised and treated as valid insofar as it concerned property within the foreign state's jurisdiction, and a rule that English courts would not normally question a *governmental* act affecting property within the foreign state's jurisdiction. While Lord Neuberger considered there to be "a very powerful argument" that the rule concerning foreign legislation should not be limited to property rights, their Lordships both agreed that the rule concerning foreign governmental acts does not include unlawful acts of personal injury (at [159]–[162]). Neither rule applied on the facts, but even if they had, their Lordships considered that their application would engage the public policy exception; that is, the act of state doctrine will not apply where it would be contrary to fundamental principles of domestic public policy. In contrast, Lord Sumption thought these two types of foreign act of state comprised a unified doctrine of "municipal foreign act of state", pursuant to which courts "will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law" (at [228]). The doctrine is limited to the territory of the foreign state, but it also applies to personal injury and other wrongs against the person (at [231]), which meant that Lord Sumption would have applied the doctrine to the acts of the Libyan, Malay and Thai authorities within their own jurisdictions (at [233]), had the public policy exception not applied (at [249]–[280]). All of their Lordships categorically rejected a form of the doctrine preventing courts from hearing claims that would embarrass the Government in its international relations.

With respect to (2), which Lord Sumption called the "international law act of state doctrine", this was said in general terms to apply where a court *cannot* address or *should refrain* from addressing an issue – for example, when asked to determine the legality of states' acts in relation to each other, or in their conduct of foreign affairs. In this respect, the doctrine is not concerned only with institutional competence, but also with the proper bounds of the judicial function. Their Lordships agreed that the doctrine was not mandated by international law, but rather, it gave effect to international comity and respect for the constitutional separation of powers. They also agreed that the doctrine was not limited to acts performed within a foreign state's territory and that it was subject to a public policy exception, though they disagreed on the precise scope of the doctrine. For Lord Mance, the need to consider the appropriateness of hearing a case meant that public policy considerations will always play a role in determining the scope of the doctrine, rather than providing the exception. Accordingly, detention in an armed conflict will sometimes fall within the doctrine, but arbitrary detention and mistreatment "goes far beyond any conduct previously recognised as requiring judicial abstention", particularly given "the nature and seriousness of the infringements of individual fundamental rights involved" (at [97]). For Lord Neuberger, the

doctrine was concerned with arrangements between states, but to avoid the doctrine encompassing all interstate conduct, he noted that it would "normally involve some sort of comparatively formal, relatively high level arrangement" (at [147]). For this reason, the doctrine did not apply to the facts of *Belhaj*, but could apply to Mr. Rahmatullah's claims, as he was transferred to US custody pursuant to a memorandum of understanding between the UK and US. Nevertheless, the claims could proceed because of the public policy exception. Finally, for Lord Sumption the doctrine applied to both cases insofar as they required consideration of the unlawfulness of a foreign state's acts, but he accepted that the cases could proceed to the extent that the public policy exception applied.

The substantive disagreement over the interpretation and characterisation of past jurisprudence means that *Belhaj* is likely not the final word on the foreign act of state doctrine. The judgments are densely reasoned and contain many interesting observations, but two points stand out. First, the remarkable – though sometimes distracting – survey of French, Dutch, German and US jurisprudence conducted by their Lordships. The decision is a paradigm of transnational judicial dialogue, even if Lord Neuberger urged "great caution before relying on, let alone adopting, the reasoning of foreign courts" (at [133]). Second, there is the role played by international law in determining English public policy. Lord Sumption considered that although not bound by international law, courts may take it into account when exercising judicial discretions or developing the common law (at [252]), and the content of domestic public policy "may be and in practice often is influenced by international law" (at [252]). Not all international law, but relying on the Supreme Court of Canada's decision in *Kazemi*, he accepted that *ius cogens* can be equated with "principles of fundamental justice" (at [257]) and limited the public policy exception to wrongs that are a violation of such norms *and* of a long-standing and fundamental value of domestic law (at [266]). Thus, his conception of public policy was not tied exclusively to international law. After an impressive examination of *ius cogens*, he concluded that the public policy exception applied only to claims involving torture and arbitrary detention; inhumane treatment and other forms of personal injury falling short of peremptory status were therefore outside the public policy exception (at [280]). Although Lords Mance and Neuberger were less emphatic about the role of *ius cogens*, they did not dismiss the relevance of these norms entirely. Lord Mance preferred to look at rights recognised as fundamental by English statute and common law (notably starting with Magna Carta), "rather than to tie them *too closely* to the conception of *jus cogens*" (at [107], emphasis added). Lord Neuberger noted that, while violation of a *ius cogens* norm "will always be a relevant public policy consideration", the doctrine is "domestic in nature" and it is "not *necessary*" for a claimant to cross this international law hurdle (at [168], emphasis added). Apart

from influencing the scope of public policy, the significance of this reasoning is that while the case was framed in terms of ordinary domestic torts, the Supreme Court nevertheless recognised that the alleged conduct of foreign states would prima facie breach international *ius cogens* norms.

Belhaj is a remarkable and progressive judgment, not just because of the extensive, if sometimes dense, reasoning on the foreign act of state doctrine, but also because it signals to the UK Government that English courts will not shy away from holding it to account for human rights abuses.

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BREWING UP REASONS

IT is trite law that good reasons must be given to justify infringements of fundamental rights protected by the European Convention on Human Rights, as incorporated into domestic law by the Human Rights Act 1998. But what reasons can one count as good reasons? In *Re Brewster's Application* [2017] UKSC 8; [2017] 1 W.L.R. 519, the United Kingdom Supreme Court addressed the question of how much deference courts should afford to post hoc rationalisations of decisions challenged for non-compliance with the Convention. The answer given by Lord Kerr, with whom Lady Hale, Lord Wilson, Lord Reed and Lord Dyson agreed, is interesting in its own terms and may have implications outside the confines of the Convention.

William McMullen died suddenly. He had been entitled to a government pension. His fiancée and cohabiting survivor, Denise Brewster, was entitled to receive his pension. But she had to have been nominated. And the agency that administers the pension scheme never received a document nominating her. Accordingly, it refused Brewster's Application.

The general tendency in this area has been from opt-in schemes (where the pension holder must actively choose another beneficiary) to opt-out schemes (where those in a close family relationship with the pension holder are presumed to be beneficiaries, subject to the pension holder's right to exclude them) (see Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law. Com. No. 307) (Cm. 7182)). In England and Wales, and Scotland, the nomination requirement has been removed: see now the Local Government Pension Scheme Regulations 2013, SI 2013/2356 and the Local Government Pension Scheme (Scotland) Regulations 2014, SSI 2014/164.

But the nomination requirement was never removed from the relevant Northern Ireland Regulations – the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009, SI 2009/32 – even though, as Lord Kerr explained, it was difficult