Triggering Art. 50 TEU: Interpreting the UK's 'own constitutional requirements'

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On September 28th the British government released its legal position on the internal constitutional position regarding the invocation of Art. 50 TEU to begin the process of leaving the European Union after the referendum result on June 23rd. The legal pleadings were released at the behest of a court order pursuant to an action taken by 'People's Challenge', a crowd-funded initiative which argued that the public had a right to view the government's legal position on the constitutionality of its invoking Art. 50 without consulting Parliament.

The broader challenge which gave rise to the formulation of the legal pleadings in the first place, is an action taken by private citizens which attempts to prevent the government from triggering Art. 50 without the explicit deliberation and consent of the parliament through a piece of legislation; proceedings in which a decision is expected later this month (*R (Miller and others) v. Secretary of State for Exiting the European Union CO/3809/2016; CO/3281/2016)*. In some ways, then, notwithstanding the momentous political context of the case, it involves a fairly routine challenge to the exercise of executive power familiar in most constitutional systems.

However, under the patchwork British constitution – partially written, partially unwritten, partially modern, partially pre-modern – the question of the extent and scope of executive power (the power in question originally stemming from the inherent royal powers of the monarch) is a much more open-ended one, involving a blend of statute law, common law and these amorphous executive powers based in the royal prerogative.

To muddy the waters even further, the event which gave rise to the current government's policy to leave the EU, the referendum result, has an ambiguous status in British constitutional law. Strictly speaking, it is parliament and not the people directly, which is sovereign under the constitution. However that particular sovereign body has had increasing recourse to referendums in recent years to solve political questions such as the Scottish Independence referendum in 2014. As such, the precise status of a referendum result will therefore be partly dependent on the Act of Parliament pursuant to which the referendum was held i.e. whether the Act states clearly what the outcome must be in the event of the referendum motion passing (although even then, of course, it would, technically, be open to parliament to repeal the relevant legislation and ignore the referendum result). Crucially, the EU Referendum Act of 2015 pursuant to which the June 23rd referendum was held *did not specify what was to happen in the event of a vote to leave the EU*. As such, the status of this particular referendum is even more ambiguous in an already ambiguous constitutional mechanism under the UK constitution.

In a nutshell, the powers at the centre of the action are a form of executive power called prerogative powers or the royal prerogative and their legal regulation is most simply expressed in four main principles:

- They are unspecified in nature and number yet no new prerogative powers can be created (all other/new executive powers must be explicitly conferred on the executive by a statute)
- They *can* be reviewed by a court but only if the subject-matter at hand is *justiciable*
- They are 'trumped' by statute whenever there is a clash in terms of subject-matter
- They cannot be exercised to frustrate the object and purpose of a piece of legislation.

The legal challenge to which the government's legal advice relates involves the undisputed prerogative power to conduct foreign relations and sign treaties and the question at issue in the proceedings relates primarily to the last two points. As such it claims that the decision to invoke Art. 50 TEU would clash with an Act of Parliament – the European Communities Act 1972 (ECA) – which should therefore take precedent and be amended or repealed for Art. 50 to be triggerd, as well as arguing that invoking Art. 50 using prerogative powers would be inconsistent with the ECA's object and purpose to give effect to the right and duties of EU membership. Therefore, the claimants alledge it is for parliament to permit the government to launch the Art. 50 process through the introduction of fresh legislation amending or repealing the ECA.

This, of course, would mean that it would be Parliament, and not the government in the final analysis that would decide on when the Art. 50 negotiations begin. Apart from issues of constitutional propriety, as with everything else involving Brexit, a good part of the motivation behind the litigation is strategic. It is generally assumed that the majority of Westminster MPs are against leaving the EU and that if they hold the power to trigger Art. 50, they will do so in a way, and at a pace, that mitigates the effects of a Brexit, (or on more wildly optimistic versions stop Brexit altogether). This assumption has been more recently disputed but it does seem clear that were the action to succeed, the triggering of Art. 50 would at least be delayed and therefore the timing taken out of the hands of the government. Perhaps more significantly, the fresh legislation needed to trigger Art. 50 could, potentially, come with considerable strings attached such as a duty to make clear what the government's negotiating position and aims are prior to invoking Art. 50 (e.g. access to the internal market or otherwise) and what it is, and is not, prepared to sacrifice in exiting the European Union. Such an Act could force the government to produce that most elusive of things in the aftermath of the referendum; that is specify what, exactly, 'Brexit' means.

Naturally the government contests this and would like to shape Brexit according to its own preferences which, given recent (mis)statements by various members of the government, not least those with portfolios most involved in the process of leaving the EU, seems to be that of a 'hard' Brexit and/or 'having its cake and eating it' by securing access to the single market without having to accept the free movement of people. The core of its arguments in the pleadings relate to disputing the fact that the prerogative power in question – the power to conduct foreign relations – is in any way fettered by the European Communities Act 1972 and that the government is free to determine the timing (and therefore also implicitly the shape) of Brexit.

The UK government's legal position on its 'own constitutional requirements' under Art. 50(1) TEU.

The key aspects of the government's pleadings relate to the following points:

1. *The Status of the June 23rd referendum result*
2. *The justiciability of the proceedings*
3. *Whether the ECA 'trumps' the prerogative power of foreign affairs.*

1. The Status of the June 23rd referendum result

The government's position is that it there is no doubt in its mind that the 2015 Act and the referendum result of June 23rd mean that it has sole responsibility and a duty to begin the Brexit process by giving notification under Art. 50 TEU. In the pleadings it notes, somewhat darkly that 'the Court must be mindful of avoiding an outcome which would prevent the Government from implementing the result of the referendum, which was provided for by an Act of Parliament.' (para. 23). Apart from the slightly patronizing tone of the statement, it assumes the answer to very question which the proceedings are there to determine – that is whether the government can implement the referendum result and trigger Brexit without Parliamentary input. It also assumes that the only constitutional way to give effect to the June 23rd referendum result is through the exercise of the executive power to conduct foreign relations which is clearly not the case. An Act of Parliament, giving statutory authorisation to the

government by bestowing powers upon it (if necessary with certain conditions attached) could achieve the ends of implementing the referendum outcome just as well (with the potentially added bonus of being more democratic and preserving the sovereignty of parliament).

It also assumes away the ambiguous status of referendums under the British constitution and their relationship to Parliamentary sovereignty, not least referendums held pursuant to Acts of Parliament which do not stipulate what, exactly, is to happen in the event of the motion being carried. The evidence adduced to support its contention is slender. It acknowledges that no specific direction was given in the event of a vote to leave in the Act authorising the referendum but that in the build-up to the June 23rd vote the government had been 'very clear' that it would invoke art. 50 in this event. This of course begs the obvious question that if it was that clear and obvious that this was the intention of the 2015 act, why was this not explicitly contained in the Act itself following the example of other referendum acts such as the Parliamentary Voting System and Constituencies Act 2011? The 2011 Act clearly stated what should happen if the motion to change the voting system was carried (in the event it was not). In the absence of a specific statutory mandate, and in the light of the ambiguous status of referendums under the UK constitution due to the existence of parliamentary sovereignty, the dismissal of the contention that it is the government's sole responsibility to begin the Brexit process is on pretty shaky ground and this is evident in this relatively poorly argued section on the constitutional significance of the referendum result.

1. The Justiciability of the proceedings

Again the pleadings seem to be slightly confused on the question of the justiciablity of the action itself. The question of justiciability is akin to political questions doctrines in other constitutional systems and was explicitly entered as a condition on the judicial review of the prerogative in the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The basic issue, as with political questions doctrines, is whether the subject matter of the proceedings are of a nature which is amendable to judicial decision-making. This is, of course, not clear-cut but usually 'core cases' of non-justiciable issues involve considerations of budgetary resource allocation or deeply political matters like the conduct of foreign relations among others.

The core of the government's pleadings here is that the question of the invocation of Art. 50 to withdraw from the EU involves matters of 'high policy' which involves a complex 'polycentric' range of issues which are more suited to political rather than judicial decision-making. On this point it seems reasonably clear that the question of leaving the EU does seem to come under the rubric of 'high policy' defined in the case of *R v. PM* [2008] UKHL 20 as matters involving 'peace and war, the making of treaties, the conduct of foreign affairs'. The point here, then, would be that the action is one which is to all intents and purposes inadmissible given that the subject matter at hand, the conduct of foreign policy, is one which courts cannot adjudicate upon. However the way in which the question is addressed in the pleadings is problematic.

Firstly, prior to dealing with justiciability, it must be determined whether the prerogative power to invoke Art. 50 exists or whether it has been superseded by the European Communities Act 1972. The question of justiciablity will be irrelevant if this is the case yet the pleadings deal with justiciability as if it were a separate issue. More problematically, the pleadings go on to claim that the relief sought is constitutionally impermissible in that it would require a court telling a government minister to introduce legislation in parliament which would be a violation of the separation of powers. However, this is also problematic. The court is constitutionally required to assess if the power to invoke Art. 50 exists under the prerogative. This is all the court has to do in relation to prerogative powers; the fact that the claimants may wish future legislation to be introduced in parliament (in fact they probably do not) is irrelevant. All the court has to do is determine whether the power exists or not; if it does, then the government may trigger Art. 50 exercising its prerogative powers, if not then it must go back to

parliament and decide what to do next. It would probably be advisable that legislation be introduced to give effect to Brexit should the claim succeed, but this cannot be equated with the Court demanding or requiring that such legislation be introduced (not least given the lack of a statutory mandate to do so in the 2015 act).

1. Does the ECA 'trump' the power to invoke Art. 50?

It is with regard to this question that the pleadings are most plausible – arguably because the law as it stands seems to be on their side. As noted, the question relates to whether the ECA already covers the power to invoke Art. 50, in which case it would not be available to the government to do so, even under the prerogative of the conduct of foreign relations or whether invoking Art. 50 would frustrate the purpose of that Act.

With regard to the question of whether the ECA or any other EU-related Act of Parliament already provides for the question of withdrawal from the EU, the pleadings undertake a brief survey of EU related legislation to find that they do not on that specific question. Various EU-related Acts do seem to cover areas which would overlap with (and therefore take precedence over) the prerogative power of the conduct of foreign relations; the regulation of UK-EU relations involving the conferral of further powers to the EU institutions contained in the European Union Act 2011 being one such example. However no act of Parliament seems to specifically cover the question of EU withdrawal and so the triggering of Art. 50 pursuant to prerogative powers would not be undermined by pre-emptive statutory provisions.

With regard to the question of whether the exercise of the prerogative to trigger Art. 50 would undermine the object and purpose of the ECA, the pleadings argue that the act of triggering Art. 50 would not undermine that object and purpose. Rather it is the final withdrawal agreement which would do this which, the pleadings accept, would be effected through an Act of Parliament.

The leading case on this question is the *Fire Brigades Union Case* [1995] 2 AC 513 where the Court found that the exercise of prerogative powers could not be exercised such as to frustrate the will of parliament as expressed in a statute (as opposed to the co-regulation of a specific power as per the previous head of argument). As such, it could be argued (and has been argued) that this case is authority for the fact that using the prerogative power to launch the withdrawal process would be to frustrate the aims of the ECA itself in that it could have the consequence, or at least run a serious risk in the light of the 2 year (renewable) time limit in Art. 50 TEU, of undermining the will of parliament to give effect to the rights and duties of EU membership. As such, it is beyond the gift of the prerogative to take an action that would frustrate the will of the Parliament in respect of the UK's EU membership. As noted the government disputes this based on the fact that triggering Art. 50 by itself would not impact upon the ECA – rather the result of the negotiations themselves would do this. Moreover the government also prefers a narrower reading of the *Fire Brigades* case reasoning by analogy with the facts in the case involving a detailed statutory regulation of a particular compensation scheme. On this narrower reading, the ECA contains no equivalent detailed regulation of EU withdrawal and therefore using the prerogative to trigger Art. 50 does not in any way undermine or by-pass the ECA.

This issue has been the subject of much considered debate in the blogosphere. It is unclear which way the courts would go on it. If it decided to take a narrow reading then it's likely that the government will succeed. However, should it take a broader contextual reading then it's possible that it may find the exercise of the prerogative to trigger Art. 50 could thwart the will of Parliament and would therefore be unlawful. Heap onto this the many arguments based on the constitutional principle of parliamentary sovereignty, that parliamentary as opposed to executive implementation of the referendum result does not go against implementing the referendum result nor the imperatives of popular sovereignty which make the result authoritative, and the fact that one of the demands of the 'leave' campaign was to reinstate the sovereignty of the British *parliament* and not the British *govern-*

ment, and it could go against the government. However in deciding this, the court would also need to clearly argue, in probabilistic terms, that the mere act of triggering Art. 50 would affect the aims and purposes of the ECA in this way.

There are many contingencies in the Brexit process, and the fact that the process has been caught up in legal wrangling before it has even begun shows that there is still a long, long road ahead before any sense of stability will return to British (constitutional) politics as well as the relationship between the UK and the EU in whatever form that may eventually take.

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