

# Law: Does Brexit Mean Exit?

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*"It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body."*

*(Put by Lord Browne-Wilkinson in R v Secretary of State for the Home Department, ex p. Fire Brigades Union [1995] 2 AC 513 at 552E and quoted in the Brexit High Court decision)*

The decision of High Court of 3rd November 2016 marked the latest in the running battles between the Brexiteers and Remainers (or Remainster's as I like to call them). Sadly it does appear that many from have failed to understand the legal complexities of the process of removing Britain from the bosom of the E.U.

Having attended the Conservative Party Conference this year I found it customary to clarify, at the start of any conservation concernin—g the Referendum, whether I voted leave or remain and my stance on the outcome of the referendum. In my case I voted remain but believe the U.K. should now exit the E.U. Pursuant to wishes of the majority displayed in the referendum. This may also be considered a sensible approach and likely to be the one most Members of Parliament will take provided they are, ultimately, given the choice to trigger Article 50. There is, of course, the proviso that the Supreme Court does not overturn the decision of the legally star studded line up of the High Court that came to it in the first place.

It is notable that the High Court bench hearing the case, consisted of three of the great legal minds namely, Lord Thomas (Lord Chief Justice of England and Wales), Sir Terence Etherton (Master of the Rolls) and Lord Justice Sales.

All three came to the conclusion that the Government 'does not have power under the Crown's prerogative [or Royal prerogative] to give notice pursuant to article 50 of the TEU for the United Kingdom to withdraw from the European Union.'

The central and sole question which the well constituted court asked itself was whether - 'as a matter of the constitutional law of the United Kingdom, the Crown - acting through the executive government of the day - is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union.'

There was, therefore no question of the merits or demerits of the UK's withdrawal from the E.U. and nothing the court said had a bearing on government policy, as policy is not law.

Interestingly it was common ground in both camps hence agreed by the Government that (1) withdrawal from the E.U. will have profound consequences in terms of changing domestic law in each of the jurisdictions of the U.K. and (2) that the 'sole' question was justiciable and is for the courts to decide i.e. only the **court** could determine the answer to the sole question. Furthermore Article 50 itself requires notice to be given in line with the constitutional requirements of the UK as a member state of the E.U. The Government and the challenging Remainsters agreed that it was for the court could determine the constitutional requirements of the UK.

The Government acknowledged that if notice under Article 50 was given, then on that notice taking effect, existing E.U. law(s) and treaties and provisions of the European Communities Act 1972 would be stripped of their effect in U.K. domestic law.

In practical terms that means that three sets of rights would be lost by British Citizens and Institutions, namely:

*(1) the rights given in the U.K. such as rights of workers under the Working Time Directive);*

*(2) the rights given in other E.U. member states such as free movement of persons and of capital and rights of freedom of establishment; and*

*(3) the rights in E.U. institutions summarised by James Eadie QC as deriving from being part of the EU Club such as the right to stand for selection and election to the European Parliament.*

The Government's argument was that such fundamental changes and loss of rights could be justified because parliament had always intended that these rights should be conditional on U.K.'s membership of the E.U. It maintained this submission on the basis that the European Communities Act 1972 (ECA 1972) defined the 'content' of E.U. rights by reference to 'E.U. treaties', which would mean that Parliament intended there to be a continuing condition for "the existence of any EU rights to be given effect in domestic law under...[the ECA 1972]... in the shape of the continued membership of the European Union...[by the U.K.]...; and that whether that condition is satisfied or not was intended by Parliament to depend entirely upon the action of the Government on the plane of international law". In essence therefore the Government's contention was that on proper construction of the section 2(1) of the ECA 1972 and any applicable case law, Parliament itself provided that E.U. rights in domestic law should be 'vulnerable to removal by Executive action on the plane of international law' through the use of the Crown's prerogative powers'.

However the High Court was of the view that the Government's case had 'glossed over an important aspect being the starting point for the interpretation of the ECA 1972; and then proceeded to a contention that the onus was on the Remainster Claimants to point to express language in the statute removing the Crown's prerogative in relation to the conduct of international relations on behalf of the United Kingdom' i.e. if the ECA 1972 is silent and does not state the Government has not got the prerogative to take the U.K. out of the E.U. then it must, by default, have the prerogative.

The High Court took the view that the Government had left out part of the relevant constitutional background. A keystone Government's own submission to the court was that the conduct of 'international relations' is a matter for the Crown in the exercise of its prerogative powers.

This however did not mean those prerogative powers could be used over 'and on' domestic legislation. 'Therefore unless Parliament legislates to the contrary, the Crown should not have power to vary the law of the land by the exercise of its prerogative powers.'

At paragraph 95 of the judgment the High Court pointed to the thrust of the Remainsters' argument being that - the Government was wrong and that U.K. domestic law could not be changed and rights thereunder nullified, unless Parliament had conferred upon the Government authority to do so either expressly or implicitly by an Act of Parliament. The Remainsters argued that the ECA 1972 contained no such authority and neither was there any other statute by which this authority was conferred.

The High Court agreed that the Government could not give notice under Article 50(2) as neither the ECA 1972 nor any other statute had conferred upon it (the Government), the right to do so.

In conclusion therefore all the High Court has said is that the Government need the authority of Parliament to make changes to domestic legislation. Of course such authority can be obtained by passing a single 'section' piece of legislation whereby the Parliament authorise the Government to trigger Article 50 which in turn, triggers the beginning of the Brexit process.

Paragraph 96 of the High Court Judgment states:

*"...approached in this way on the basis of the claimants' primary submission, it follows from the detailed analysis that we have set out that the ECA 1972 confers no such authority on the Crown, whether expressly or by necessary implication. Absent such authority from the ECA 1972 or the other statutes, the Crown cannot through the exercise of its prerogative powers alter the domestic law of the United Kingdom and modify rights acquired in domestic law under the ECA 1972 or the other legal effects of that Act. We agree with the claimants that, on this further basis, the Crown cannot give notice under Article 50(2)."*

It follows therefore that **Brexit does mean exit** and the likelihood is that even if the Government lose the forthcoming Supreme Court appeal, it will be in a position to trigger Article 50 providing Parliament follow the will of the majority.

Now politically speaking, it follows that a failure to follow that majority may result in a early general election being called, with the British public returning Members of Parliament that are more likely to vote for Brexit. I am of the view, that the Brexiteers have very little to fear providing the Government of the day is strong on Brexit.

**DATE: 14th NOVEMBER 2016**

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