



## ERG: Does Article 50 require an Act of Parliament?

- The law firm Mishcon de Reya is investigating whether they can force a Parliamentary vote on the use of Article 50 – the EU’s ‘exit article’. Their case is based on *The Case of Proclamations 1610* “..the King by his proclamation... cannot change any part of the common law, or statute law, or the customs of the realm...”. It is argued that triggering Article 50 would repeal the European Communities Act 1972 by Royal Prerogative.
- However, following the exercise of Article 50 the ECA 1972 would be redundant rather than repealed as it would give domestic force to a Treaty that would no longer affect the UK.
- It is unclear what remedy the law firm is seeking, it seems highly unlikely that a UK court would injunct a Prime Minister from exercising a Treaty function following a referendum.
- It follows that it would be possible to avoid a direct vote on repeal of the ECA 1972. The only domestic legislation required by EU withdrawal would be, to place EU law we want to keep into domestic law, and to ratify any new agreement.

### Background:

The UK is a ‘dualist’ state in that international law only has force in the UK as a result of domestic legislation. With the European Union, the UK’s international obligations have force in the UK as a result of the European Communities Act 1972.<sup>1</sup>

Under the Treaties Article 50 allows the UK to give notice it will leave the EU, on the completion of a new agreement or after 2 years the UK will have left.

### What is the basis of the case?

Although Mishcon de Reya does not say much in their press release<sup>2</sup> two of the named lawyers have written articles on the subject. David Pannick QC in the Sunday Times<sup>3</sup> and Tom Hickman co-authored a piece on the UK Constitutional Law blog.<sup>4</sup>

In these articles the authors claim that the Prime Minister using the Royal Prerogative to trigger Article 50 would repeal the European Communities Act 1972 in contravention of

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<sup>1</sup> 1972 Act; <http://www.legislation.gov.uk/ukpga/1972/68/contents>

<sup>2</sup> Mishcon de Reya, Press Release, 3 July 2016:

[http://www.mishcon.com/news/firm\\_news/article\\_50\\_process\\_on\\_brexit\\_faces\\_legal\\_challenge\\_to\\_ensure\\_parliamentary\\_involvement\\_07\\_2016](http://www.mishcon.com/news/firm_news/article_50_process_on_brexit_faces_legal_challenge_to_ensure_parliamentary_involvement_07_2016)

<sup>3</sup> Sunday Times 30 June 2016; <http://www.thetimes.co.uk/article/why-giving-notice-of-withdrawal-from-the-eu-requires-act-of-parliament-dz7s85dmw>

<sup>4</sup> UK Constitutional Law blog, 27 June 2016; <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>

common law. Hickman, in his co-authored cites, *The Case of Proclamations*, (1610) where Sir Edward Coke declared:

*“...the King by his proclamation... cannot change any part of the common law, or statute law, or the customs of the realm...”*

And a more recent case the *Fire Brigades Union Case*<sup>5</sup>, where Lord Browne-Wilkinson stated that:

*“...it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme...”*

Despite the superficial attractiveness of this argument, it ignores the essential differences between these cases of a domestic statute and an international law obligation. In a dualist state the domestic legislation required to enact the ECA 1972 is only there to fulfil the international law obligations. The legislation will not be repealed by Article 50, just rendered redundant.

In any case it seems highly unlikely any Court would grant the firm's clients (who remain anonymous) any remedy. An injunction on the Prime Minister activating the Article following a national referendum would be highly unlikely and a post-facto declaration would be of little value.

#### **Article 50 – does the EU require an Act of Parliament?**

Article 50 itself says that it should be exercised *“in accordance with its own constitutional requirements.”* However, it would seem illogical that the EU itself could question whether a UK domestic requirement has been met, as in the absence of a legal case they must be assumed they have.

#### **Constitutional Renewal and Governance Act 2010 (CRGA)<sup>6</sup>**

A separate line of argument would be to argue that the CRGA, which put Treaty ratification on a statutory basis, creates a necessity for legislation. However the legislation appears only to deal with ratification, not the exercise of a termination clause. Section 20 refers exclusively to ratification:

*“Subject to what follows, a treaty is not to be ratified unless”*

While Section 25 excludes decisions made under a Treaty – i.e Article 50:

*“But “treaty” does not include a regulation, rule, measure, decision or similar instrument made under a treaty (other than one that amends or replaces the treaty (in whole or in part)).”*

#### **What will Parliament have to vote on?**

Although it is preferable to repeal the European Communities Act 1972 it would not be necessary to do so if the process in Article 50 is followed to a point that the treaties no

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<sup>5</sup> [1995] 2 AC 513 in 1995

<sup>6</sup> UK Gov; <http://www.legislation.gov.uk/ukpga/2010/25/part/2>

longer apply to the UK. The ECA 1972 puts into domestic law the UK's international obligations, if those have terminated the Act becomes redundant.

However, legislation would be required for any agreement arising out of the Article 50 process, and for other issues such as the rights of EU citizens already in the UK.