Triggering Article 50—prerogative power or parliamentary mandate?

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Public law analysis: Charles Bankes, partner at Simmons & Simmons in London and Brussels, and Ajit Kainth, supervising associate with the firm in London, consider it a real possibility that Parliament will be able to apply political pressure to call for a parliamentary mandate to trigger Article 50 of the Treaty on European Union (TEU).

What are the arguments being put forward in the battle between those who claim the Prime Minister can trigger Article 50 TEU using prerogative powers and those who say this is a matter for Parliament?

On the one hand, the government has been clear that giving notice under Article 50 TEU falls within the prerogative powers, which are a collection of executive powers held by the Crown since medieval times and now exercised by senior government ministers. On the other hand, others are arguing that Article 50 TEU cannot lawfully be invoked without a formal act of the UK Parliament.

Proponents of the latter theory argue that, given that a notification under Article 50 TEU would trigger the process by which the European Communities Act 1972 (ECA 1972)—which implemented EU law in the UK after the government had acceded to the Treaty of Rome under prerogative powers—would no longer be applicable in the UK, a further act of Parliament would be required to start this process.

The Brexit referendum result itself is not legally binding and the argument is that it would be unlawful for the Prime Minister to invoke Article 50 TEU without the approval of Parliament. EU Membership has conferred numerous legal rights on British citizens by operation of ECA 1972 and the UK government cannot use its prerogative powers to overturn these statutory rights. There is also a further strand of argument that revolves around the idea that there is a developing constitutional convention that requires prerogative powers to be subject to parliamentary approval (as was the case in relation to military action in Syria in 2013).

Conversely, some experts argue that the decision to leave the EU is a matter relating to the conduct of foreign affairs which falls squarely within the prerogative powers. The UK government itself has taken this position but has stated that the repeal of ECA 1972 would require parliamentary approval. Furthermore, the language in ECA 1972, s 2(1) itself provides room for the exercise by the government of the prerogative powers to invoke Article 50 TEU. ECA 1972, s 2(1) states that:

‘all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties [...] as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom.’

The reference to ‘restrictions from time to time being created or arising by or under the Treaties’ which are to automatically given legal affect could be viewed as creating or acknowledging the existence of a space which supports the use of the prerogative powers to trigger Article 50 TEU even if this leads to ‘restrictions’ (ie the ending of the application of the treaties pursuant to Articles 50(2), 50(3) TEU).
It is interesting that all parties in this debate appear to accept that the giving of notice under Article 50 TEU is an irrevocable step, leading inevitably leading to Brexit. If this is not the case, then the argument for parliamentary approval is weaker.

**To what extent does the foreseeability of any change to ECA 1972 upon triggering Article 50 TEU influence these arguments? Is triggering Article 50 TEU tantamount to using prerogative powers to change statute?**

The foreseeability of any change to ECA 1972 once Article 50 TEU is triggered is the key factor that lies at the heart of the two different schools of thought on the method for the triggering of Article 50 TEU. The argument that the triggering of Article 50 TEU falls within the prerogative powers is partially predicated on the understanding that the repeal of ECA 1972 (which involves a change in UK statute) is different to and separate from the triggering of Article 50 TEU (which concerns the conducting of foreign affairs).

Other commentators have said that ECA 1972, s 2(2), which enables ministers to make provision for the purpose of enabling rights enjoyed or to be enjoyed by the UK by virtue of the treaties to be exercised, could be used to argue that this statutory base supersedes the overlapping prerogative power to conduct foreign affairs. According to these commentators, the UK enjoys the new rights of orderly withdrawal from the EU and the right to withdraw unilaterally pursuant to Article 50 TEU, and these rights therefore need to be exercised pursuant to ECA 1972, s 2(2) (which would require a further Act of Parliament).

**Are there any historic examples of prerogative powers and the sovereignty of Parliament coming into conflict?**

There are several examples of prerogative powers and the sovereignty of Parliament clashing in previous cases. At the heart of these examples lies the principle that the government through the exercise of the prerogative powers cannot undermine a statute and/or take away rights given by Parliament.

One such case is *Attorney-General (on behalf of His Majesty) v De Keyser's Royal Hotel, Ltd* [1920] All ER Rep 80. In that case De Keyser's Royal Hotel Ltd, as owner of a hotel situated on the Victoria Embankment in London, claimed compensation for occupation of the hotel by the armed forces in 1916. This claim was based on the Defence Act 1842 (DA 1842). The government argued that DA 1842 did not apply—the government had seized the property for the defence of the realm, which was subject to compensation in the royal discretion. If this argument was successful, the government would have to pay less compensation to De Keyser's Royal Hotel Ltd. In 1919, the Court of Appeal reversed the decision of the High Court and decided that De Keyser's Royal Hotel Ltd, as the hotel's owner, was entitled to compensation in the manner provided by DA 1842. On further appeal, the then House of Lords unanimously affirmed the Court of Appeal's decision. It rejected the government’s claim that it could rely on prerogative power, and ruled that once the statute had been enacted the prerogative powers fell into abeyance. DA 1842 operated for the benefit of subjects, therefore its more generous compensation provisions could not be avoided by instead relying on prerogative powers.

*Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182, which concerned an attempt by the government to rely on the prerogative power to make and act under treaties with foreign powers in order to revoke a commercial airline operator’s licence, is another example of parliamentary sovereignty trumping prerogative powers. In that case, Laker Airways applied to the Civil Aviation Authority pursuant to the Civil Aviation Act 1971 (CAA 1971) for a licence to fly between the UK and the US, which was granted. At the time, an air carrier also had to be designated by the UK government, pursuant to the terms of a treaty between the
UK and US providing for UK government designation before airlines could operate in American airspace, in order to fly a transatlantic route. The UK government designated Laker Airways under the treaty and the designation then needed to be countersigned by the American government. A new UK government was then formed and that government sought to revoke the UK designation previously granted to Laker Airways. Laker Airways challenged this decision. The Court of Appeal held that once a UK licence had been granted to the airline, CAA 1971 operated for the licensees’ benefit and its effect could not be frustrated by UK ministers using prerogative power to cancel the designation granted under the relevant treaty. In effect, the prerogative power to make and act under treaties with foreign affairs was suspended so far as its use would be inconsistent with the statutory goal set out in CAA 1971.

The case of R v Secretary of State for the Home Department ex parte Northumbria Police Authority [1989] 1 QB 26 was one where the use of prerogative powers was held to be valid. The case concerned the UK Home Secretary’s power to issue equipment to a police chief constable without the consent of the police authority under the prerogative power of keeping the peace. The Court of Appeal held that, while the Police Act 1964 (PA 1964) also gave the Home Secretary the power to issue equipment, the government had a prerogative power to keep the peace within the realm, which was not displaced by or inconsistent with PA 1964. Therefore, the Home Secretary could have acted as he did even if PA 1964 had not provided such powers. In short, the court established in this case that the prerogative power is only affected by legislation to the extent that the legislation is inconsistent with or displaces the prerogative power in question.

The final case for discussion is R v Secretary of State ex parte Fire Brigades Union [1995] 2 AC 513, [1995] 1 All ER 888 which has been used to argue that, as the triggering of Article 50 TEU would lead to the ECA 1972 being a ‘dead letter’ and nullify rights created by ECA 1972, a parliamentary vote is required to trigger Article 50 TEU. In the Fire Brigades Union case, prerogative powers were used to set up the Criminal Injuries Compensation Scheme with compensation payments to be assessed under the scheme on an individual basis by the Criminal Injuries Compensation Board. The Criminal Justice Act 1988, which had been passed but had not been implemented by way of statutory instruments, was to introduce a generous statutory scheme to be set up. On a judicial review application by a trade union, the Court of Appeal held that the fact that Parliament had already passed legislation providing for the setting up of a criminal injuries compensation statutory scheme meant that UK ministers could not use the prerogative powers to set up a different scheme instead. This was the case even though the legislation had not yet come into force—such legislation could still effectively suspend the prerogative powers.

As you can see from the foregoing discussion, there have been previous cases that provide examples of prerogative powers and parliamentary sovereignty coming into conflict. However, we consider that in the case of Brexit the context is very different—the stakes are very high and the triggering of Article 50 TEU will affect the rights of many, not just a few or one. In that sense this conflict between the prerogative powers and parliamentary sovereignty is unprecedented.

Have we seen any developing constitutional precedent around governments seeking parliamentary approval before using prerogative powers?

Some commentators have stated that there is a developing constitutional convention that requires that prerogative powers be subject to parliamentary approval, for example in the context of the deployment of troops. The growing importance of this constitutional convention is evidenced by the Commons vote against military action in Syria in 2013. The real question is whether this constitutional convention legally curtails the use of prerogative powers to trigger Article 50 TEU.
While there is a constitutional convention to seek parliamentary approval in the context of the use of force, the extent of this convention (even within the specific context of the use of military action) and what it requires (ie debate in parliament or a vote) is not clear-cut. There are clearly strong political and democratic reasons why an unprecedented decision which will have a greater impact than recent decisions to go to war and which will profoundly change the UK's legal system should properly be subject to parliamentary consideration. However, we are less clear that a court will conclude that Article 50 TEU notice must be preceded by a parliamentary mandate on the basis of a constitutional convention (by analogy to the convention to seek parliamentary approval to go to war), or indeed another ground.

To the extent that this convention is established, it appears to require a resolution of the House of Commons. This falls short of the arguments being advanced in relation to triggering Article 50 TEU, which conclude that an Act of Parliament is required.

**Could the courts be used to settle this dispute?**

The courts are already being used to settle this dispute. A legal challenge on the triggering of Article 50 TEU will be heard by the English High Court in October 2016 by a Divisional Court, including the Lord Chief Justice. A number of applicants are seeking judicial review of whether Article 50 TEU can be triggered by the use of prerogative powers or requires a parliamentary vote. A parliamentary vote on the triggering of Article 50 TEU is viewed as problematic by 'Leave' supporters because a majority of MPs want to remain in the EU. If a parliamentary vote is required it could hinder or delay a Brexit. Interestingly, 1,000 barristers wrote an open letter on 10 July 2016 to the then Prime Minister, David Cameron, stating that the Brexit vote was advisory only and primarily legislation is needed in order to trigger Article 50 TEU.

At a first hearing on 19 July 2016, the High Court stated that the legal challenge on the triggering of Article 50 TEU should have a lead claim and that other potential claimants be given permission to pursue claims in parallel or act as interested parties in relation to the lead claim. The court also stated that the government must respond to a number of letters before action sent by claimants before the commencing of the judicial review. Interestingly, due to the importance of the case, the court is putting arrangements in place to 'leapfrog' an appeal to the Supreme Court, which should be heard in December 2016. This timetable will ensure that the case is fully heard before the courts prior to the government’s expected triggering of Article 50 TEU in early 2017.

**Could Parliament itself force the government into allowing a vote on the triggering of Article 50 TEU?**

Parliament could apply political pressure in order to force the government into allowing a vote on the triggering of Article 50 TEU. The argument for MPs who favour a vote would be similar to the legal arguments, namely that the:

- referendum result was not legally binding on it (if Parliament wanted this to be the case it would have set it out in the relevant statute, namely the **European Union Referendum Act 2015**)

- triggering of Article 50 TEU will mean the repeal of a statute (namely, **ECA 1972**) which only Parliament should be able to do, and

- triggering of Article 50 TEU is an irreversible and monumental step that calls for a vote in the Commons.
The arguments for MPs who do not want to see a vote will be that the prerogative powers can be used to trigger Article 50 TEU (much like those powers were used to accede to the Treaty of Rome).

We consider it a real possibility that Parliament will be able to apply political pressure to call for a parliamentary mandate to trigger Article 50 TEU.

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