

NO, WE ARE NOT BEHIND THE MISHCON DE REYA LEGAL BID

[DRAFT COMPOSED IN JULY 2016, WITH UPDATED COMMENTS]

July 2016

You may have read that Mishcon de Reya, a prominent firm of solicitors, are launching a legal bid to determine who (and how) decides the removal of the United Kingdom from the European Union.

Just before the referendum, and following David Cameron's statements about intending to trigger Article 50 shortly after the referendum, I examined this matter and I reproduce two emails which give the essence of the arguments. (They are emails and not polished political or legal statements.)

Crown prerogative and its exercise are an opaque area of the British constitution. Generally legal treaties have been regarded as only one factor in the British government (and here I mean a majority of the Cabinet), taking any foreign action. The most prominent occasion was the declaration of war in August 1914. It is true that Edward Grey made a speech to parliament on August 3rd 1914 which is often quoted. This speech did not define the trigger required for war, nor was there a vote in the House of Commons. What did happen was a massive 'spin' operation in Parliament and the media to define the Asquith government's confusion as 'statesman-like'. The Asquith government was saved by the Germans openly invading Belgium. As Asquith wrote to Venetia Stanley on August 4th 1914, "*We got the news that the Germans had entered Belgium ... This simplifies matters, so we sent the Germans an ultimatum.*"

This ultimatum was never put to Parliament for pre-approval.

It is pretty clear that the new Prime Minister will need some 'simplification' shortly after taking office.

The bottom line is this:

The new Prime Minister must ensure that the UK Parliament did not reject his (her) notification as not being within the constitutional requirements. Quite evidently the defeated Remain groupers in Parliament could hide behind this. At first sight, it would therefore seem a new Prime Minister should carry a short bill or possibly a resolution that 'Parliament should take note of the result of the referendum that Parliament called and that the government should implement the result and that it should notify the EU of its intention'.

Any opponents of democracy would be flushed out.

Emails dated 21-22 June 2016:

“Can Cameron decide to make an Article 50 notice to withdraw while sitting in his bath?”

1) “*Any member may decide to withdraw from the Union in accordance with its constitutional requirements*”. The “*withdrawal*” is clearly the repeal (or modification) of the ECA Act of 1972 but what is, and who takes, the decision to withdraw? As the decision to withdraw is effectively the same as the withdrawal under Article 50, this seems to require an Act of Parliament.

2) We know the Treaties will cease to apply two years after notification (unless otherwise agreed) so who gives the notification, and when?

It seems to me that “*notification of its intention to withdraw*” means also the decision to withdraw has been taken constitutionally and that is the same as withdrawal, although the decision to withdraw and the withdrawal would take place at different times. Therefore, the notification cannot be given until the decision to withdraw has been taken. Only an Act of Parliament can withdraw and, therefore, only an Act of Parliament can decide to withdraw, with an effective later date, or no date, determined.

Therefore, no notification can be given until an Act of Parliament takes place.”

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'If I were the post-Brexit PM, I'd trigger Article 50 straight away'

Well, the point of the note was to explore whether a post-Brexit PM could do that -in his bath! or by a media leak or a PR statement.

Surely any such action would immediately invite the enquiry as to whether this 'notification' complied with the UK's constitutional requirements. Alternatively the EU could say, well we assume that the British PM knows the UK's constitutional requirements better than us so that's it- the notification is a commitment and UK leaves the EU in 24 months, that is done and dusted, now we are off to Mykonos for 2 months and let the British PM deal with the fallout from his actions e.g. that the UK Parliament would reject his notification as not being within the constitutional requirements since the British PM cannot withdraw Parliament's assent to the ECA while sitting in his bath or indeed in any posture..

'No point in enacting post 24th June legislation'. As you know the Leave Alliance does not think we should abandon regulatory convergence for several years as it restricts the possibilities for the UK. Also a feature is that we would repatriate or enact as UK law all EU relevant legislation since 1973 exactly the same as Ireland and India did specifically and the American states did by implication after independence. I mean all pending cases in the North Carolina courts in 1783 under the Theft Act did not cease because the UK recognized North Carolina as independent, they simply carried on while there were some immediate changes at the constitutional level, that is what I expect to see in the UK.

It is then worth looking at each area of law and policy because some such as Foreign Policy would have hardly any legislative problems while in others such as the CAP this could carry on as it is for some time while the direction was transferred from Brussels to London-however a lot of the UK's trade is food products so that would have to be worked in.

So to maintain regulatory convergence the UK would enact post 24th June EU laws

Update: November 4th 2016

It appears that the judges have arrived at the same conclusion, albeit using different arguments against the use of Crown Prerogative and citing the removal of rights from British citizens. This seems to me a rather weak line of argument when one considers that the declarations of war by Prerogative in 1914 and 1939 certainly removed the rights of British citizens.

However, Asquith was never pressed by Parliament for a vote of approval for war to take place because of the 'simplification' caused by the German invasion of Belgium.

Up to now, the new government has had ample warning of this problem and could have taken the opportunity in July of passing a short bill or a motion as laid out above.

It will now have to scramble to catch up but then it is clearly not yet ready to enter a negotiation so perhaps a further few months' delay will be beneficial.

[Word count: 1099]