

PARLIAMENT TAKES BACK CONTROL OVER BREXIT

Joaquín Tornos Mas

Tenured Professor of Administrative Law. Universitat de Barcelona

The High Court in London ruled on 3 November 2016 that the UK Government does not have the power to notify the EU of the intention of the country to begin the process of withdrawal from the Union. The Court considers that the notification of such a relevant decision requires previous agreement of the Parliament.

The Judgment has caused quite a political storm. Prime Minister Theresa May had announced she would begin the process of exit in March 2017 in order to definitely leave the EU by 2019. However, she has been forced to change plans. Some media such as the Daily Mail did not hesitate to call the three judges “enemies of the people” and UKIP leader Farage claims that the Judgment is a betrayal of the 51% of voters who supported the Brexit. But what are the reasons alleged by the Court? Has the Judgment been so unexpected?

The Claimants, a public fund manager and a hairdresser, demanded respect for the constitutional principle by means of which the Crown’s prerogative powers cannot be used by the Government with the aim of suppressing or reducing rights that are recognized by UK laws, unless the Crown is expressly or implicitly authorized by the Parliament.

This approach had already been highlighted by the Report of the Select Committee on the Constitution of the House of Lords (4th Report of Session 2016-17), of 13 September 2016. A comment on this Report can be found in our blog post of 13 October 2016.

The Judgment of 3 November has undoubtedly had to give an answer to a question of major political importance. However, the case has been resolved through a clear and precise legal reasoning based on the principles of the UK Constitution. The Court examines the content of Article 50 of the Treaty on European Union, the principles of the UK constitutional system with regard to the Parliament’s sovereignty and the Crown’s prerogative powers, and finally the content and effects of the 1972 European Communities Act on the accession of the UK to the European Economic Community.

According to the previous scheme, the most relevant statements of the Judgment are the following:

- The matter at issue must be resolved pursuant to the principles of the UK constitutional system.

- The most

fundamental rule of the UK constitutional system is the sovereignty of Parliament, with express citation of A.V. Dicey and his *An introduction to the Law of the Constitution*.

- The powers of the Crown under its prerogative constitute the residue of legal authority left in the hands of the Crown. However, the subordination of the Crown to Law is the foundation of the rule of law and the constitutional system in the UK.
- As a general rule, the making and unmaking of international treaties is regarded as a matter for the Crown in the exercise of its prerogative powers.
- Nevertheless, these powers need to be analyzed bearing in mind that the Treaty at issue (ECA 1972) contains rights for individuals and revoking it would affect the content of such rights. For this reason, the Judgment examines in detail the rights of the UK citizenship derived from the 1972 Treaty. The Brexit will make them disappear or at least modify them.
- The 2015 European Union Referendum Act did not enable the Government to give notice of withdrawal under Article 50 of the Treaty on European Union in case results backed exiting the EU, and nor does the ECA 1972. What is more, the Court understands that, as the accession to the EU was laid down by law, it is only through another law that this decision could be revoked.
- Finally, the Court reminds of the advisory nature of the referendum.

In light of the above, and despite the political value of the referendum, the Government does not have power to give notice pursuant to Article 50 of the TEU for the UK to withdraw from the EU. On the contrary, this notification needs approval by Parliament in accordance with the principles of the UK constitutional system.

The Judgment has been taken to the Supreme Court and the decision is expected to be heard during the first week of December. What will be the consequences of a Judgment confirming the Judgment under appeal? Some ideas:

- The Brexit will get back to the political stage and require that the different political parties and deputies take new approaches.
- The decision to exit the EU is not expected to change. It should be remembered that the Members of Parliament will take carefully into consideration the results of the constituencies.
- Prime Minister will be required by Parliament to define her strategy and negotiating objectives in order to obtain votes in favor of the notice under Article 50. Given that each party may require different specifications, the debate might be prolonged and prevent the notice from being given in March.
- In order to authorize the notice, Parliamentarians may also ask the Prime Minister to commit herself to holding a new referendum on Brexit terms after the negotiating process and before the agreement with the EU.

Institut de Dret Públic

Adolf Florensa, 8, 1r pis Tel. (+34) 93 403 45 35
08028 Barcelona Fax. (+34) 93 403 45 36
www.idpbarcelona.net idp@ub.edu