

## **Parliament or Prime Minister: who can start the process of the United Kingdom's withdrawal from the EU under Article 50 TEU?**

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1. Who can start the process of the United Kingdom's withdrawal from the EU under Article 50 of the Treaty on European Union (TEU)? Article 50 sets out the procedure for withdrawal but is silent on this question, providing only that '*Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements*'. So the answer to the question turns on what are the '*constitutional requirements*' of the United Kingdom.

2. The question has assumed critical importance following the outcome of the referendum on 23 June 2016 in favour of leaving the EU and has sparked a considerable political and legal debate. That narrow referendum result, by 52% to 48%, did not have any direct legal consequences under the terms of the European Union Referendum Act 2015. The result is merely advisory, although its political significance is, of course, enormous. But it did not start the Article 50 process. How is the process to start? Is it a '*constitutional requirement*' of the UK that Parliament must legislate to start the process, or can the decision be taken by the Prime Minister (in practice, whoever replaces David Cameron as leader of the Conservative party in the current leadership race)? And what role do the other devolved parts of the United Kingdom, its Crown Dependencies and overseas territories have to play? Some of these (Scotland, Northern Ireland, Gibraltar) voted overwhelmingly to remain in the EU while others (the Channel Islands, Isle of Man, overseas territories such as the Cayman Islands) were not given an opportunity to vote in the referendum at all. Are there any '*constitutional requirements*' relating to these jurisdictions that must be complied with before Article 50 may be triggered? And if the Prime Minister or other Minister did assert their right to start the process, could the courts intervene?

### **Article 50 and its consequences**

3. Article 50 TEU provides:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in

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accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

4. Article 50 TEU was introduced by the Lisbon Treaty in 2007 and came into force in 2009. It provides the only mechanism by which a Member State can leave the EU. There are a number of features of Article 50 that are of significance and which I take to be not in dispute. First, the process can only be initiated by the departing Member State, not the other Member States. Second, a formal decision must be communicated to the EU institutions to commence the process. Third, once the process has begun, by Article 50(3) the EU treaties will automatically cease to apply to the departing Member State after a period of two years or on such other date as may be agreed between the Member State and the EU. If no agreement is reached after two years, and no extension is agreed to the time limit, the UK will cease to be a part of the EU. EU law will cease to operate in the UK and its Crown Dependencies and the rights of British citizens automatically to be treated as EU citizens under Article 20(1) of the Treaty on the Functioning of the European Union ('TFEU') will be lost including rights to move, settle and work freely in other EU countries. The single market in goods and services will be closed to the UK and its territories and WTO rules of trade will apply by default resulting in the introduction of trade tariffs between the UK and EU and the loss of access to preferential trading agreements between the EU and other parts of the world.

5. Article 50(3) provides that the two year period can only be extended by unanimous agreement of the other 27 EU states. Article 50 is silent as to whether a party that has triggered that process may later stop it if it changes its mind. Whether or not it can be stopped will be a political decision for the other 27 EU Member States who will have little incentive either to agree to extend the time period or to the process being stopped. As the expiry of the two year limitation period draws near the UK will be negotiating from an increasingly weak position: with the prospect of a disorderly exit from the EU and with no option of stopping or reversing the clock, the government will be under immense pressure to accept whatever deal is then on

the table, however bad. And two years is no time at all: the trade negotiations between Canada and the EU (which Boris Johnson has said is the model the UK would emulate) started in 2009 and have still to be concluded.

6. Some legal commentators have suggested, including Prof. Mark Elliott in his blogpost here (<https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>), that the Article 50 process can be reversed unilaterally by the Member State after it has given notification under Article 50(1). This view was also expressed by Professor Derek Wyatt QC when giving evidence to the House of Lords Select Committee on the European Union on 8 March 2016: (<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/the-process-of-leaving-the-eu/oral/30>). Others disagree, for example Barber, Hickman and King in their blogpost here (<https://ukconstitutionalaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>). For my part I cannot see how Article 50 can be stopped by a Member State unilaterally. That would be inconsistent with the express requirement in Article 50(3) that the two year period can only be extended by the unanimous agreement of the other 27 Member States. That rule would be otiose if the departing Member State could simply change its mind and walk away, thereby avoiding the consequences of Article 50. Even if the UK did purport to stop the process, if the other Member States insisted the clock was still running the UK would be unable to challenge that conclusion because the jurisdiction of the CJEU will also lapse once the EU treaties cease to apply. A 2016 Briefing note prepared by the European Parliamentary Research Service for the European Parliament suggests that the process can only be reversed with the agreement of the remaining Member States:

Furthermore, it should be noted that the event triggering the withdrawal is the unilateral notification as such and not the agreement between the withdrawing state and the EU. The merely declaratory character of the withdrawal agreement for cancellation of membership derives from the fact that the withdrawal takes place even if an agreement is not concluded (Article 50(3) TEU). This does not mean, however, that the withdrawal process could not be suspended, if there was mutual agreement between the withdrawing state, the remaining Member States and the EU institutions, rather than a unilateral revocation.

7. Article 50 is therefore a lobster pot, legally and politically: once a Member State is in it, the only way they can get out is with the agreement of the other Member States who will have every incentive to first ensure the best deal for themselves. Even if they agree to the UK remaining within the EU it might only be on condition that the UK give up its opt-outs and rebates

8. This was also the view expressed by Sir David Edward, a former judge of the European Court of Justice, when giving evidence to the House of Lords Select Committee on 8 March 2016:

It does not seem to me that you can necessarily say, “Right; I have put you to all this trouble; we have negotiated for two years and now I do not actually like the terms you are offering so I want to go back to zero”. My hunch is that many of them might say, “Right, back to zero. No more optouts”.

### **The competing contentions (1) The Prime Minister may pull the Article 50 trigger**

9. On any view, then, the legal and political risks of pulling the Article 50 trigger are enormous. On whose authority should those risks be taken?

10. Looking at the position without the complicating factors of the devolved administrations, Crown dependencies and overseas territories, there are essentially two competing contentions.

11. The first is that the Prime Minister can make the decision to initiate the Article 50 process under ancient prerogative powers, exercised on behalf of the Crown, which include the conduct of foreign affairs and the making (and unmaking) of treaties. The exercise of prerogative powers does not require the authorisation of Parliament because any treaty made (or unmade) does not create or remove rights domestically unless and until Parliament gives effect to it by primary legislation. *‘Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation’* (Rayner (Mincing Lane) Ltd v DOT [1990] 2 A.C. 418, 500C-D, per Lord Oliver). The EU Treaties were entered into by the UK under those prerogative powers but were given effect domestically by the European Communities Act 1972 (the 1972 Act). If the UK withdraws from existing EU Treaties, or a new treaty is concluded with the EU, then Parliament will need to legislate to give domestic effect to that new treaty and to amend or repeal the 1972 Act, but not before then. Until then, domestic law – the 1972 Act - will remain unchanged and any decision to trigger the Article 50 process under prerogative powers would be lawful.

12. This view is supported by a number of legal commentators, including Carl Gardner (<http://www.headoflegal.com/2016/06/27/article-50-and-uk-constitutional-law/>), David Allen Green ([https://www.facebook.com/permalink.php?story\\_fbid=1200279093330132&id=137432829614769](https://www.facebook.com/permalink.php?story_fbid=1200279093330132&id=137432829614769)) and Prof. Mark Elliott (<https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>).

13. This is also the position that the government appears to have taken. In his resignation speech on 24 June 2016 the Prime Minister said this:

A negotiation with the European Union will need to begin under a new prime minister and I think it's right that this new prime minister takes the decision about when to trigger Article 50 and start the formal and legal process of leaving the EU.

14. Mr Cameron told the House of Commons on 27 June 2016 that ‘the triggering of Article 50 is a matter for the British Government’, and ‘a national sovereign decision’ (HC Hansard, 27 June 2016, col 36 and col 51). He said he could not guarantee that there would be a vote in the House of Commons, as the arrangements put in place would be for the new Prime Minister and his or her Cabinet to decide (ibid, col 40).

### **The competing contentions (2): Only Parliament may pull the trigger**

15. The alternative argument – and the correct one, in my view – is that Parliament alone can make the decision to trigger Article 50. This argument may be advanced in two ways and summarised as follows. First, it is a fundamental constitutional principle – the principle of legality - that only Parliament can modify or abrogate existing domestic rights. Because Article 50 will inevitably lead to the modification or abrogation of existing statutory rights under the 1972 Act it cannot be authorised by the executive under prerogative powers but only by an Act of Parliament. Second, on a proper interpretation of the 1972 Act and the European Union Act 2011 (the 2011 Act), the amendment or withdrawal from an EU Treaty can only be authorised by Parliament. The royal prerogative cannot be exercised in such a way as to frustrate the objects and purposes of the 1972 Act (the argument articulated by Barber, Hickman and King in their blogpost here (<https://ukconstitutionalaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>)) or the 2011 Act (an argument put forward by Arvind, Kirkham, and Stirton in their blogpost here (<https://ukconstitutionalaw.org/2016/07/01/t-t-arvind-richard-kirkham-and-lyndsay-stirton-article-50-and-the-european-union-act-2011-why-parliamentary-consent-is-still-necessary/>)).

*(a) The principle of legality: existing rights may only modified or abrogated by primary legislation*

16. Returning to the first formulation of the argument, it is a fundamental constitutional principle that ‘*the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament*’ (Rayner, ibid, 500B-C). This principle was expressed by Lord Coke in the Case of the Proclamations (1610) 12 Co. Rep. 74, ‘*the King by his proclamation... cannot change any part of the common law, or statute law, or the customs of the realm...*’. This is an instance of the so-called principle of legality, which is itself an expression of an even more fundamental constitutional principle: Parliamentary sovereignty, the *grundnorm* upon which the entire British constitution is based.

Triggering the Article 50 process will deprive individuals of the rights which they currently enjoy under the EU Treaties by virtue of the 1972 Act. While that deprivation will not be immediate it will be inevitable once the two year period for negotiating a new Treaty elapses. Notification under Article 50(1) is the ‘*event triggering the withdrawal*’ from the EU treaties which by Article 50(3) will occur automatically once the two year negotiation period has expired unless some other treaty is made. Notification is therefore ‘*self-executing*’ in domestic law because all the rights arising under the EU treaties, which are given effect domestically by the 1972 Act, will be abrogated or modified in that event without the need for any further Act of Parliament.

17. The doctrines of legality and of Parliamentary sovereignty dictate that only primary legislation can abrogate or modify existing domestic rights; Parliament alone can lawfully authorise the withdrawal from those treaties. To seek Parliament’s involvement after the event is to present it with a *fait accompli*: by then the UK may have already left the EU and, in any event, the process is irreversible once begun. Article 50 can only be triggered by an Act of Parliament.

(b) Parliamentary authorisation is required by the 1972 Act and the 2011 Acts

18. The second formulation of the argument is that authorisation to commence the Article 50 process is also required to be given by Parliament in order to comply with existing EU legislation, namely the 1972 and 2011 Acts.

19. Under the scheme of the 1972 and 2011 Acts, any *major* changes to the rights arising under the Treaties such as the accession to a new Treaty require Parliamentary authorisation.

20. Before any *new* EU treaty can enter into domestic law Parliament’s authorisation must be obtained at three stages. First, if the Treaty is one that amends the TEU or TFEU then by s 2 of the European Union Act 2011 it must be laid before and approved by Act of Parliament (and, in some circumstances, also approved by a referendum) before it is ratified. In fact, even if the treaty is not one that amends the TEU or TFEU it will need Parliamentary authorisation by way of the negative resolution procedure before ratification under s 20 of the Constitutional Reform and Governance Act 2010. Second, by s 1(2) of the 1972 Act an ‘EU Treaty’ is to be specified as such for the purposes of s 1(1) by way of Order in Council, which must then be approved by both Houses of Parliament under the positive resolution procedure. Third, an Act of Parliament is necessary in order to make the necessary amendment to the definition of ‘the Treaties’ in s 1(1). Only then will a new EU Treaty take effect domestically.

21. The 1972 and 2011 Acts therefore provide a ‘triple lock’ of Parliamentary authorisation in the process of determining whether rights arising under a new EU Treaty are to take effect domestically. In my view it would be contrary to the objects and purposes of both Acts if an existing treaty could be substantially amended, repudiated or otherwise brought to an end, thus

abrogating existing rights under the 1972 Act, by an executive act without Parliamentary authorisation. Parliamentary authorisation which is sought *after* withdrawal from the treaty will be meaningless because the rights will already have been lost, the legislation giving effect to them will be a dead letter and Parliament will simply be presented with a *fait accompli*. Even if a new treaty is agreed requiring Parliamentary authorisation under the 2011 Act a refusal to sanction the terms of a new deal will be ineffective for the reasons I explore at para 28, below. Parliamentary authorisation must come first.

22. It is instructive that in *Macarthy's Ltd v Smith* [1979] 3 All ER 325 Denning LJ considered that if ever the EU treaties were to be repudiated that would require an Act of Parliament, not an act of the executive under prerogative powers or s 2(2) of the 1972 Act:

If the time should come when *our Parliament* deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.

23. It is also implicit in the judgment of the Court of Appeal in R (Shindler) v Chancellor of the Duchy of Lancaster [2016] EWCA Civ 469 that the process of leaving the EU would be led by Parliament, not by the government. Lord Dyson, the Master of the Rolls,

19. *I accept that Parliament is sovereign and that it does not need the mandate of a referendum to give it the power to withdraw from the EU. But by passing the 2015 Act, Parliament has decided that it will not withdraw from the EU unless a withdrawal is supported by referendum. In theory, Parliament could decide to withdraw without waiting for the result of the referendum despite the passing of the 2015 Act. But this is no more than a theoretical possibility. The reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum that it has set in train. In other words, the referendum (if it supports a withdrawal) is an integral part of the process of deciding to withdraw from the EU. In short, by passing the 2015 Act, Parliament decided that one of the constitutional requirements that had to be satisfied as a condition of a withdrawal from the EU was a referendum.*

24. I accept that the point now under consideration was not argued before either Court, but it is instructive that in both cases these very senior judges *assumed* that Parliament, rather than the executive, would be responsible for the process of withdrawal from the EU treaties themselves.

25. The point may be tested in the context of the Article 50 process. Once begun, the process can only end in one of three ways: first, if no acceptable agreement is reached, the UK will be ejected from the EU after the two year period provided for by Article 50(3) and the existing Treaties will cease to apply; second, if the United Kingdom agrees a new treaty with the other Member States requiring amendment or replacement of the TEU and/or TFEU; or, third, the

*status quo ante* may be preserved, although this can only occur if the other 27 Member States agree.

26. In the first scenario, if no new treaty is agreed between the UK and the EU before the time limit under Article 50(3) expires then there will be no further requirement for Parliament to consider the UK's relationship with the EU at all. The Article 50 notification process will have had the same effect as if the government had repudiated all the EU treaties. The effect will be to abrogate all the rights arising under s 2(1) of the 1972 Act which will no longer give effect to 'the Treaties' as defined in s 1(1). The constitutional process by which EU rights are given effect domestically by the repeal or amendment of the 1972 Act is by-passed, contrary to the statutory framework and frustrating its objects and purposes.

27. In the second scenario, if a new treaty is agreed, this would have to be put before Parliament before ratification by virtue of s 2(1) of the 2011 Act or s 20 of the 2010 Act. But Parliament would be confronted with Hobson's choice. It will have to accept the deal that the new treaty represents because if it rejects the deal and insists on an alternative – including retaining the *status quo* – the result will be the automatic ejection of the UK from the EU under Article 50(3) unless the other 27 Member States are prepared to agree a different deal. That would be contrary to the statutory framework and frustrate the objects and purposes of the 2011 Act and the 2010 Act which require Parliament (and sometimes the electorate) to determine the UK's best interests in relation to its international treaty obligations. In this scenario Parliament does not determine the UK's best interests: the government and the other 27 EU Member States have done so.

28. In summary, both the principle of legality and the 1972 and 2011 Acts require that Parliament must authorise any modification or abrogation of the rights arising under the EU Treaties. Because the modification or abrogation of rights follows necessarily and inevitably once notification is given under Article 50, authority is in fact given by whoever gives the required notification to start the process and Parliament is effectively side-lined from having any further role. Only an Act of Parliament can provide the necessary authorisation under Article 50.

### **Some other arguments**

#### *Is withdrawal from the EU Treaties already authorised by s 2(1) of the 1972 Act?*

29. The argument that s 2(1) of the 1972 Act itself authorises the UK's withdrawal from the Treaties is articulated by Prof. Mark Elliott in his blogpost here (<https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>). Prof. Elliott argues that the words '*rights ... created or arising from time to time*' under the Treaties envisages the addition, or removal, of such rights without the need for further statutory intervention. S 2(1)

gives effect to the rights ‘*from time to time*’ created or arising under the Treaties, whether these are added to, reduced or removed altogether. The repudiation of the Treaties which provide the content of the rights given effect by s 2(1) is not inconsistent with the underlying scheme of the 1972 Act.

30. I do not agree. S 2(1) does not operate so as automatically to give effect to rights arising under a new EU Treaty without the triple Parliamentary authorisation outlined above. Its function is to give Parliamentary authorisation to *non-Treaty* changes to the rights and obligations ‘*from time to time*’ arising under *existing* Treaties, such as those created by way of directly effective Regulations, Directives or judgments of the CJEU, without the need for further legislation. S 2(2) then makes provision for the making of subordinate legislation to give effect to other non-Treaty changes that do not take effect automatically under s 2(1), namely any non-directly effective EU obligation such as a Directive. But neither s 2(1) or 2(2) may be used to give effect to rights arising under a *new* EU Treaty without the Parliamentary authorisations required under the 1972 and 2011 Acts.

31. Nor, in my view, can s 2(1) or 2(2) be used to authorise the repudiation or withdrawal of the UK from any of those Treaties without Parliament’s further authorisation for the reasons I have outlined above. Only Parliament can make rights enforceable in domestic law; and only Parliament can unmake them.

32. Prof. Elliot’s argument does not grapple sufficiently with the problem we have identified, namely that the notification under Article 50 is itself the event that triggers withdrawal from the EU treaties in the scenarios outlined at paras 23-27 above, and Parliament would be denied any substantive role if the Article 50 trigger is pulled by the Prime Minister or other Minister. His argument proceeds on the assumption that the Article 50 process would be reversible if the UK so desired, which it is doubtful (and certainly cannot be assumed). He also proceeds from the false premise that the complementary roles of the government and of Parliament in *making* Treaties are replicated when *unmaking* them. He states that just as it was for the government to enter into EU treaty obligations, ‘*so it is for the Government, using prerogative power, to extricate the UK from those obligations*’; and ‘*just as it was for Parliament to enact such domestic legislation as EU membership required (such as the ECA 1972), it is equally for Parliament to enact any domestic legislation that Brexit may in due course require*’. This approach fails to recognise that that just as rights may not be created in domestic law other than by primary legislation, so they cannot be *removed* without such legislation. The order in which government and parliament execute their function is not the same when breaking treaties as it is when making them. The Government makes the treaty and Parliament has the final decision whether to give effect to its rights in domestic law. Having done so, however, only Parliament can then lawfully authorise the modification or abrogation of the rights to which it gives rise before the government breaks the treaty. Otherwise it is the government which effectively

modifies or abrogates those domestic, statutory rights when repudiating or withdrawing from the treaty.

33. Prof. Elliott's reasoning is also flawed in his assertion that the effect of Article 50 '*does not change statute law, not least because — as noted above — withdrawal from the EU pursuant to the Article 50 process does not require or purport to effect any alteration to the ECA 1972*'. This is to misunderstand the nature of the rights given effect by the ECA 1972. Although these rights are derived from the EU Treaties they are *statutory* rights because they are created by the relevant statute, the 1972 Act. In this respect the rights are similar to those arising under the Human Rights Act 1998 (HRA); the rights arising under the 1972 Act and the HRA are part of our law while those arising under the EU Treaties and the European Convention on Human Rights are not<sup>2</sup>. The amendment or repudiation of an EU Treaty modifies or abrogates statutory rights created by the 1972 Act. Statute law *is* changed.

34. Prof. Elliott's reasoning is also based on a mistaken assumption that the 2011 Act has no relevance to the operation of Article 50<sup>3</sup>. True, the 2011 Act would play no part in the event that the UK withdraws from the EU Treaties in their entirety by operation of Article 50(3). But if an alternative treaty agreement were reached between the UK Government and the EU then the 2011 Act *would* be relevant. The new arrangement would have to be approved by Parliament under the 2011 Act before it was ratified. For the reasons I have explained at para 28, Parliament would have no realistic alternative but to accept that agreement, which would frustrate the objects and purposes of that Act.

35. To summarise, repudiation or withdrawal from the EU treaties, whether by Article 50 or otherwise, is not authorised by s 2(1) of the 1972 Act.

*Can withdrawal from the EU Treaties be authorised under s 2(2) of the 1972 Act?*

36. An alternative argument, articulated by Mark Tucker in his blogpost [here \(https://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/\)](https://ukconstitutionallaw.org/2016/06/29/adam-tucker-triggering-brexit-a-decision-for-the-government-but-under-parliamentary-scrutiny/), is that authorisation to withdraw from the EU Treaties is given by s 2(2) of the 1972 Act. S 2(2) confers power upon the executive by Order in Council (itself an instance of the prerogative) or by '*order, rules, regulation or scheme*' to make provision '*for the purpose ... of enabling any rights enjoyed ... by the United Kingdom under or by virtue of the Treaties*'. As Article 50 confers a '*right enjoyed*' by the United Kingdom it may be '*enabled*' by one of the mechanisms in s 2(2).

<sup>2</sup> *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26, ('*Al-Skeini*'), para 10, 134, citing *Re McKerr* [2004] UKHL 12, paras 25, 62.

<sup>3</sup> '*And while it is true that the European Union Act 2011 regulates the exercise of the prerogative treaty making power in certain EU related respects, none of those respects is relevant to the present discussion*'.

37. For my part, I am not convinced the use of this power would be lawful to effect major changes to the UK's EU treaty obligations. It could not be lawfully exercised to give effect to any new Treaty not listed in s 1(1) of the 1972 Act which, as I have explained, requires a triple-lock of Parliamentary authorisation including by primary legislation. The function of s 2(2) is to give effect to non-directly effective EU measures made under existing Treaties, not to repudiate or withdraw from those treaties, whether under Article 50 or otherwise. Moreover there are clear limitations on the law-making power in s 2(2) by Schedule 2 of the 1972 Act, which provide (para 2) that the power shall not be used to impose or increase taxation, to apply laws retrospectively, to confer any power to legislate by subordinate instrument or to create any criminal offence. It is inconceivable that the s 2(2) power was intended to be used to enact subordinate legislation, with limited Parliamentary oversight, to authorise the executive to repudiate or withdraw from all the EU Treaties. Any subordinate legislation purporting to do that would be *ultra vires*.

### **Enter devolution: the devolved administrations, Crown Dependencies and Overseas Territories**

38. The argument that Parliament must take the decision under Article 50 is further reinforced once the position of the devolved administrations (Scotland, Wales and Northern Ireland), Crown Dependencies (Jersey, Guernsey and the Isle of Man) and Overseas Territories (Gibraltar, Bermuda, the Cayman Islands, among others) is taken into account. They are either part of the UK or subject to its sovereignty and the Crown, through the government, is responsible for their foreign policy, including entering into and withdrawing from any international treaty. Any rights of the citizens of these jurisdictions under the EU Treaties will also end if and when the United Kingdom withdraws from the EU and the government will be responsible for negotiating any new arrangements with the EU on their behalf. The Article 50 procedure I have outlined above is therefore critical to their continuing enjoyment of any EU rights that they currently enjoy. The '*constitutional requirements*' referred to under Article 50(1) must take into account the particular requirements of each of these jurisdictions.

39. There are significant differences between each of these jurisdictions and significant complexities that will need to be explored in more detail at another time. But the following broad points may be made.

#### *The devolved administrations: Scotland, Wales and Northern Ireland*

40. The devolved administrations of Scotland, Wales and Northern Ireland are party to the EU Treaties through their membership of the UK and their citizens enjoy the same EU rights to which the 1972 Act gives effect as any other UK citizen. Each of these jurisdictions participated fully in the EU referendum and will be represented in Parliament if (or when) it considers how the Article 50 process should commence and when any subsequent treaty requires to be ratified and given effect by primary legislation. There is no doubt that the UK

Parliament retains power to legislate for the devolved administrations: for example, the UK Parliament's power to legislate for Scotland is made explicit by s 28(7) of the Scotland Act 1998, which provides: '*This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.*'

41. But are there any additional '*constitutional requirements*' to be met before the Article 50 process can be commenced beyond an Act of the UK Parliament? Possibly. There is a reasonable argument that the Scottish Parliament's consent to legislation authorising the Article 50 procedure would also be required. S 28(8) of the Scotland Act 1998 provides that the UK Parliament will not '*normally*' legislate without the consent of the Scottish Parliament for '*devolved matters*' (matters falling within the Scottish Parliament's competence) or where the UK Parliament seeks to modify the powers of the devolved institutions. S 28(8) gives statutory effect to the Sewel Convention which operated, albeit without the force of law, from 1998 until the introduction of s 28(8) with effect from 23 May 2016. The conduct of international relations (including with the EU) is a '*reserved matter*' (Sch. 5, Part I, para 7) and not a '*devolved matter*' to which s 28(8) applies at all. However, the EU Treaties do affect many areas that are '*devolved matters*' and withdrawal from them will also '*modify the powers of the devolved institutions*', a view taken by Paul Reid in his blogpost here (<https://ukconstitutionallaw.org/2016/07/02/paul-reid-brexit-some-thoughts-on-scotland/>). It is therefore arguable that the consent of the Scottish Parliament must be given to that legislation.

#### *The Crown Dependencies of Jersey, Guernsey and the Isle of Man*

42. The Crown Dependencies of Jersey, Guernsey and the Isle of Man are not part of the United Kingdom but are self-governing possessions of the Crown (defined uniquely in each jurisdiction) with their own constitution, legislature and laws. The Crown (through the UK government) may legislate for the islands by Acts of Parliament or Order in Council and is responsible for their foreign affairs including the making and breaking of EU treaties, but these powers are subject to important constitutional limitations.

43. The Crown Dependencies and their citizens have different but nevertheless important treaty rights and obligations arising from their relationship with the EU. These will also be determined by the Article 50 notification procedure. By virtue of Article 355 (5)(c) TFEU and Protocol 3 to the UK's original Accession Agreement the Crown Dependencies are part of the EU for the purposes of free movement of goods but not of services, people or capital. Effect is given to these treaty arrangements by local legislation: for example, in Jersey by the European Communities (Jersey) Law 1973 which operates in a materially identical manner to the 1972 Act. Residents do not enjoy full EU citizenship rights, although the vast majority of the population are also British citizens by virtue of their parents or grandparents or past residence in the UK. They are therefore EU citizens with the right to move, settle and work freely within the EU. It is notable that the vast majority of the Crown Dependencies were not

entitled to participate in the EU referendum because, although British citizens, they had not been resident in the United Kingdom within the last 15 years.

44. What are the ‘*constitutional requirements*’ of Article 50 as far as the Crown Dependencies are concerned? As I have mentioned, while the Crown can legislate for each of the islands this power is subject to laws and conventions the precise ambit of which is uncertain. What is clear, however, is that in Jersey there is a statutory requirement that the States (the legislative assembly) must be given the opportunity to signify their views in respect of any legislation of the UK Parliament that is intended to apply to Jersey (article 31 of the States of Jersey Law 2005). The 2005 Law is primary legislation to which the Crown has given its authorisation by Order in Council. In my view any UK legislation that authorises the pulling of the Article 50 trigger falls within the requirement in s 31 of the 2005 Law. The Article 50 decision would have the effect of modifying or abrogating rights arising under the European Communities (Jersey) Law 1973 in exactly the same way as it does the 1972 Act within the United Kingdom. It must therefore be taken by way of primary legislation in Parliament and communicated to the States for their views to be signified under article 31 of the 2005 Law.

45. Although a reference under article 31 would not entitle the States of Jersey to veto the legislation it would provide an important opportunity for the island’s democratically elected representatives to communicate their views about their continuing relationship with the EU. And if Jersey is consulted it would seem inconceivable that the other Crown Dependencies would not also be consulted.

*The British Overseas Territories (Gibraltar, Cayman Islands and others)*

46. The fourteen British Overseas Territories are territories under the jurisdiction and sovereignty of the United Kingdom. They are those parts of the former British Empire that have not chosen independence or have voted to remain British territories. Most of the inhabited territories are internally self-governing, with the UK retaining responsibility for defence and foreign relations and with power to legislate for the ‘peace, order and good governance’ of the territory. The rest are either uninhabited or have a transitory population of military or scientific personnel. They share the British monarch (Elizabeth II) as head of state.

47. The Overseas territories include Gibraltar, to whom the EU treaties apply albeit with modified treaty arrangements, and also includes a number of territories (such as the Cayman Islands, Bermuda, British Virgin Islands, Falkland Islands and the Turks and Caicos Islands) with rights arising from their relationship with the EU as Overseas Countries and Territories (‘OCT’s) of the UK<sup>4</sup>. Under Part IV TFEU (Articles 198 to 204), ‘*the Member States agree to associate with the Union the non-European countries and territories which have special*

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<sup>4</sup> House of Commons Foreign Affairs Committee - Overseas Territories - 7th Report of Session 2007-08 (Vol D), paras 112-118

*relations with Denmark, France, the Netherlands and the United Kingdom*’ (Article 198). The European *acquis* does not apply to OCTs; instead, the detailed rules and procedures for the Association are provided for by the Council Decision 2013/755/EU (the Overseas Association Decision (OAD)). The OAD offers a modernised trade regime that focuses on three main areas: trade in goods, trade in services and cooperation on trade related issues. It ranks OCTs among the EU's most favoured trading partners, not only because of the OCTs' duty and quota free access to the EU market for goods, but also because the OCTs will automatically receive better terms of trade in services and establishment. The OCTs also benefit from significant EU development funding.

48. Although citizens of the overseas territories do not have free movement rights arising out of their status as OCTs, by virtue of the British Overseas Territories Act 2002 they are all treated as British citizens and therefore automatically qualify as EU citizens with full free movement rights.

49. If the United Kingdom withdraws from the EU then the overseas territories would lose their status as OCTs and their citizens would cease to be citizens of the EU. The Article 50 process will affect the rights of citizens of these overseas territories; Gibraltar has most at stake given its proximity and direct road access to Spain. What steps must be taken to meet the ‘*constitutional requirements*’ of Article 50(1) so far as these overseas territories are concerned?

50. There is no doubt that the UK Parliament may legislate to modify or remove the rights of citizens of the overseas territories under the EU treaties. The UK has unlimited powers to legislate for the overseas territories, whether by act of Parliament or prerogative powers by way of Order in Council (except Bermuda for which the UK may only legislate by Act of Parliament, or by Order in Council under an Act of Parliament). This is usually made express in their constitution, for example s 125 of the Constitution of the Cayman Islands and s 8 of the Constitution of Gibraltar both expressly reserve the Crown’s right to legislate ‘from time to time for the peace, order and good government’ of the territory. Moreover the Crown’s prerogative powers to legislate may be exercised without the consent of the local population to modify or abrogate even the most fundamental of rights for the benefit of the UK as a whole, even if that does not benefit the people of that territory: see R (Bancoult) v SSFCO [2009] 1 A.C. 453. Indeed, in 2009 the Crown legislated by prerogative powers to dissolve the legislative authority of the Turks and Caicos Islands and to suspend jury trial in response to evidence of serious corruption among members of the legislature and the risks that of influence on jury members in such a small community. This was held to fall squarely within the powers of the Crown by the Court of Appeal in R (Misick) v FCO [2009] EWCA Civ 1549.

51. So there is power to legislate to remove EU rights, but is there any rule of law requiring the consent of, or even prior consultation with, an overseas territory before Parliament (or the Crown) legislates for it? In modern practice consultation with overseas territories is normally

undertaken where practicable<sup>5</sup>. Can this practice be elevated into a principle of law? It is UK policy that ‘*The people of the Overseas Territories have a right to ... self-determination*’, which does not sit comfortably with the notion that the Crown can legislate without the consent of or consultation with the people of the territory. Moreover for most of these territories the European Convention on Human Rights has been extended to the territory and given effect domestically through legislation, for example in the Constitution of the Cayman Islands and the Constitution of Gibraltar. As Professor Jeffrey Jowell has said, ‘*The principle that there should be no legislation without representation ... has evolved into a fundamental international legal standard, set out for example in article 3 of Protocol I of the European Convention on Human Rights, now incorporated into UK law under the Human Rights Act 1998,53 which UK courts are now bound to follow.*’<sup>6</sup> The question of whether this is a ‘*constitutional requirement*’ for the purposes of Article 50 is therefore not straightforward and requires determination. If it can be shown that there is now a rule of law that the UK will not effect profound changes to existing rights of its overseas territories without, at the very least, formal consultation with the local legislature then this may constitute a further ‘*constitutional requirement*’ to be complied with before the Article 50 trigger can be pulled.

### **Would the decision to start the Article 50 process amenable to judicial review?**

52. So could a legal challenge be brought to challenge the decision to start the Article 50 process? Certainly, decisions of government bodies to exercise prerogative powers are susceptible to judicial review and the Courts could even be invited to decide the issue by way of a declaration before any Article 50 notification is made. However, the courts have tended to treat the exercise of the Crown’s prerogative treaty making powers as being non-justiciable. But the courts take this approach because the making of treaties does not usually destroy or create rights at domestic law: ‘*it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant*’ (Rayner, *ibid*, p. 500C-D). Where the effect of the exercise of prerogative treaty-making (or breaking) powers is to determine rights under domestic law then the decision *is* justiciable: see R (CND) v. Prime Minister [2002] EWHC 2777 (Admin), para 36, approved by Lord Kerr in R (SG) v SSWP [2015] UKSC 16, para 237. So the competing contentions of who may take the decision, Parliament or Prime Minister, will also determine whether the decision is susceptible to judicial review.

53. Moreover, and in any event, statutory jurisdiction for the courts to determine the meaning of Article 50 is conferred by s 3(1) of the 1972 Act, which provides that ‘*For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties ... shall be treated as a question of law for determination as such in accordance with the principles laid*

<sup>5</sup> I. Hendry and S. Dickson, *British Overseas Territories Law*, p. 57

<sup>6</sup> Jowell, ‘The UK’s Power over Jersey’s Domestic Affairs’, from ‘A celebration of autonomy: 1204-2004 800 years of Channel Islands’ Law’, p. 257

*down by and any relevant decision of the European Court*. S 3 makes it clear that the meaning of a treaty provision is a question of law for the courts, not for politicians, applying EU law. And it may be that such a legal question would require a reference to the Court of Justice of the EU for an authoritative determination of Article 50's meaning, in particular as to whether the Article 50 process is reversible once begun.

54. I would add that an exercise of the prerogative affecting the devolved administrations, the Crown Dependencies or the overseas territories may also be susceptible to a legal challenge in the United Kingdom (see, for example, R (Barclay and others) v Lord Chancellor [2010] 1 A.C. 464).

### **Conclusion**

55. There are a number of '*constitutional requirements*' that must be fulfilled before the United Kingdom can lawfully set in train the process for withdrawal from the EU under Article 50 reflecting the diversity of the different constitutional arrangements of the territories for which the UK is responsible on the international plane. First, within the United Kingdom the doctrine of legality and the proper interpretation of the 1972 and 2011 Acts requires that the process be authorised by an Act of Parliament. Second, the consent of the devolved legislatures may also be required, particularly in the case of Scotland by virtue of s 28(8) of the Scotland Act 1998. Third, the Crown Dependencies should be consulted, particularly Jersey for whom there is a statutory requirement that the Jersey legislature, the States, have an opportunity to consider any legislation passed by the UK Parliament that extends to it. Fourth, the British Overseas Territories deserve (at the least) to be consulted before any UK legislation removing rights enjoyed by its citizens should come into force, including EU rights which will be lost as a result of any notification commencing the Article 50 withdrawal process.

56. I see no reason why a court should not decide the constitutional question of whether Parliament or Prime Minister should start the Article 50 process. Moreover I think it would be in *everyone's* interests to have an authoritative ruling on the meaning of Article 50 before the process commences.

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**BRICK COURT CHAMBERS**

**4 JULY 2016**