

Brexit: a view from afar

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A Introduction

On 23 June 2016, the United Kingdom voted 52:48 in a national referendum to leave the European Union (“Brexit”). The vote was a giant leap into the unknown. The Remain voters knew well what they were voting for: 40 years of the status quo as a member of, first, the European Economic Community (EEC), then the European Union (EU). Transnational economic trade relations morphed into European political integration based on a single, non-negotiable principle: the free movement of people, goods, services and capital. The Remain voters well understood the implications of European political and economic integration. The Leave voters, on the other hand, did not. They cried “plague on both your houses!”

23 June 2016 was a day-in-the-life that will reverberate for decades to come. Where Britain will sit in the world 10, 20 or 30 years from now is anyone’s guess. No one knows what post-Brexit Britain will look like from an economic trade, a defence and security or an international relations perspective.¹ The breathless commentators seek to reassure us but they are hopelessly divided. Some play down the foreboding, others ramp it up. Some say “business as usual, with or without Europe”, while others forecast “gloom, doom and prolonged recession”. Tea leaves would be a surer guide.

This commentary addresses the legal implications of the vote. There is sharp disagreement over the steps that must be taken in order to exit the Union. One view is that the United Kingdom Parliament must authorise the withdrawal; the contrary view is that the Government may initiate the withdrawal under the royal prerogative in external affairs without any parliamentary involvement. Both views are plausible, but one view is clearly to be preferred over the other. It would be

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¹ An insightful sketch of post-Brexit Britain was published two months before the June referendum: Report of the House of Commons Foreign Affairs Committee, *Implications of the referendum on EU membership for the UK’s role in the world*, Fifth Report of Session 2015-16, HC 545, 26 April 2016 (<http://www.parliament.uk/facom>).

unthinkable, legally and politically, for the United Kingdom to trigger the withdrawal process without Parliament's blessing and involvement. The European Communities Act 1972 (UK) secures the United Kingdom's continuing membership of the EU, and the royal prerogative in external affairs cannot be exercised in contravention of existing legislation. A legislative override of that Act and other EU-related legislation is needed before any steps might be taken.

B Political miscalculation

There is an uneasy truth about Brexit: it was borne out of sheer political miscalculation. The Brexit vote took Britain (and the world) by surprise. The smart money was on the Remain camp prevailing. Most polls predicted a win for former Prime Minister, David Cameron, and the Remain camp, although the odds did shorten in the countdown to the vote. Cameron had come under mounting pressure from within his Party to rein in the Eurosceptics, who have always balked at Brussels, the EU bureaucracy and Britain's perceived loss of sovereignty. Cameron promised the referendum, confident the Remain vote would prevail. He gambled, and he lost. There then unfolded something truly perplexing about this game of thrones: there was no contingency plan should the unthinkable happen. No thought had been given as to what steps would need to be taken, should Brexit come to pass. There was nothing: just a void. The Scottish First Minister, Nicola Sturgeon, called it a "leadership vacuum".² She slammed the Cameron Government as "reckless and irresponsible".³

The 52:48 vote immediately precipitated a leadership meltdown. Cameron resigned as Prime Minister, effective as soon as a successor could be found. He announced that on the day following the referendum. Six days later, the main public face of Brexit, Boris Johnson, quit the leadership contest over who would replace Cameron as Prime Minister.⁴ This followed the revelation from Justice Secretary Michael Gove that he was withdrawing his support for Johnson and standing for the leadership himself.⁵ Four days after Johnson's announcement, the other public face of Brexit, Nigel Farage, unexpectedly resigned as leader of the United Kingdom Independence Party (UKIP).⁶ His work was done; he cited his wish to go fishing. For victor and vanquished alike, the 52:48 vote exacted its toll.

² "Nicola Sturgeon: Scottish Parliament could block Brexit", *The Guardian*, 26 June 2016 (<http://www.theguardian.com/politics/2016/jun26/nicola-sturgeon>).

³ "'It's reckless' Sturgeon swipes at May on Brexit", *Sunday Express*, 2 September 2016 (<http://www.express.co.uk/hews/uk/706509>).

⁴ "Boris Johnson rules himself out of Tory leadership race", *The Guardian*, 30 June 2016 (<http://www.theguardian.com/politics/2016/jun/30/boris-johnson-rules-himself-out-of-tory-leadership-race>).

⁵ "Conservative MPs in uproar as Boris Johnson 'rips party apart' by withdrawing from leadership contest after ambush by Michael Gove", *The Telegraph*, 30 June 2016 (<https://www.telegraph.co.uk/news/2016/06/30/>).

⁶ "Nigel Farage resigns as Ukip leader after 'achieving political ambition' of Brexit", *The Guardian*, 4 July 2016 (<http://www.theguardian.com/politics/2016/jun/04/nigel-farage-resigns-as-ukip-leader>).

C Institutional incapacity

Britain is now battling a new problem: institutional incapacity. It does not have the international negotiators needed to negotiate the United Kingdom's withdrawal and settle its future relations with the bloc. Britain has not had its own dedicated team of negotiators for 43 years (since it joined the EEC in 1973). The European Commission negotiates trade agreements on behalf of all EU member States. Post-Brexit Britain must also establish trade deals with up to 50 nations around the world which have bilateral trade treaties with the EU. Secretaries of State, David Davis and Liam Fox, appointed to oversee Britain's withdrawal, are struggling to make appointments to their new departments – the Department for International Trade and the Department for Exiting the European Union. As of mid-August 2016, Davis had recruited fewer than half of the 250 staff he requires, and Fox had recruited less than one tenth of the 1000-strong department he requires: “[T]heir new Whitehall departments are being set up from scratch and the situation is ‘chaotic’, said one senior city source who has spoken to ministers.”⁷

Lack of departmental infrastructure is one problem; negotiating experience is another. The Brexit ministers privately acknowledge that they “don’t even know the right questions to ask when they finally begin bargaining with Europe”.⁸ *The Telegraph* reported that New Zealand had offered the use of its top trade negotiators, who had recently negotiated a free trade agreement with China and led negotiations over the Trans-Pacific Partnership Agreement.⁹ New Zealand's Foreign Affairs Minister, Hon Murray McCully, confirmed that New Zealand had offered to assist Britain in any way it could.¹⁰

This is not the first time Britain has been caught on the defensive. In the lead-up to the 2010 general election, it dawned that Britain was headed for a hung Parliament. There was a problem: the officials had no clear means of dealing with this. Britain had no Cabinet Manual setting out the understandings and expectations of cabinet government, including the processes of government formation. Was this the atrophy of Empire, when once proud nations wane and wither? But, luckily for Cabinet Secretary, Gus O'Donnell, there was a solution. He turned to New Zealand for the constitutional machinery which it had developed to accommodate its Mixed Member Proportional

⁷ “‘Chaos’ likely to delay Brexit”, *The Press*, Christchurch, 15 August 2016, B1 (<https://www.pressreader.com/new-zealand/the-press/20160815/281900182609026>).

⁸ “Brexit could be delayed to late-2019 as government not ready – Sunday Times” (<http://www.reuters.com/article/us-britain-eu-timing-idUSKN1000Y9>).

⁹ “New Zealand offers UK its top trade negotiators for post-Brexit deals”, *The Telegraph*, 30 June 2016 (<http://www.telegraph.co.uk/business/2016/06/29/new-zealand-offers-uk-its-top-trade-negotiators>).

¹⁰ “Murray McCully offers Britain help with looming Brexit trade negotiations”, *The New Zealand Herald*, 31 August 2016 (http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11665945).

(MMP) electoral system adopted in 1996.¹¹ To accommodate minority government under MMP, the Cabinet Office had crafted a set of rules fashioned around a new understanding, called the “caretaker convention”. This convention ensures the orderly processes of government until a new government can be formed and sworn in. This convention is set out in Chapter 6 of New Zealand’s Cabinet Manual, titled “Elections, Transitions, and Government Formation”.¹² O’Donnell visited New Zealand before the 2010 elections, and returned clutching chapter 6.

It was serendipitous that O’Donnell could turn to New Zealand in 2010. But that story is quite unlike the present: there is no quick-fix solution to Brexit. On June 24th, Britain stared into an abyss. Political miscalculation had plunged it into a constitutional no-man’s land, from which it will struggle to extricate itself. Staggeringly, it was the Cameron Government’s considered view *not* to instruct its key ministries to plan for the possibility of Brexit that produced this state of affairs; more on that below.¹³

D Article 50 trigger

Article 50 of the Treaty on European Union (the Lisbon Treaty) is the mechanism for withdrawal from the Union. Article 50 reads:

- “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 ... [T]he 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 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

¹¹ See the Electoral Act 1993 (NZ) for the MMP system.

¹² *Cabinet Manual 2008*, Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, New Zealand.

¹³ See under the heading “I Closing observations”. See *Equipping the Government for Brexit*, House of Commons Foreign Affairs Committee, 20 July 2016, paras 14-20 (<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaff/431/43106.htm>). See also David Allen Green “Brexit and the challenges of reality”, 1 August 2016 (<http://blogs.ft.com/david-allen-green/>).

referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

In reality, Article 50 heads in one direction only – towards exiting the Union. Politically (and perhaps legally), there is no turning back once the trigger is pulled. How plausible is the argument that paragraphs (2) and (3) recognise an implicit, unilateral right to revoke a notice to withdraw? Professor Paul Craig has described the legal position as “contestable”, although he believes that a Member State ought to be able to revoke an Article 50 notification.¹⁴ He appeals to arguments of principle, text and teleology.¹⁵ In truth, the legal position is, as Craig said, contestable. The House of Lords Constitution Committee acknowledged that the legal position was “unclear” but considered it “prudent” to assume that the triggering of Article 50 could not unilaterally be reversed.¹⁶ The EU would be within rights to insist on a literal reading of Article 50, wait for the two-year sunset period to elapse, and proclaim the withdrawing State no longer an EU Member State.

It is a different issue whether or not the EU would wish to eject a Member State that had changed its mind. One can discern mixed feelings towards Brexit on the continent. There are reports that the EU leaders intend to make the Brexit negotiations so intolerably tough that the United Kingdom might be forced to reconsider its decision to exit the Union. Britain, it was believed, might reach that position when confronted by the “reality of the bureaucratic nightmare” and the “insane act of economic self-harm”.¹⁷ British officials are already warning that negotiations are becoming “dangerously entrenched”, even before the Government has invoked Article 50.¹⁸ The EU negotiators are undoubtedly in a more powerful position than their British counterparts.

Most are agreed that Article 50 tips the balance of negotiating power “massively in favour of the [EU]”.¹⁹ Some have estimated that it might take a decade of instability before Britain can disentangle itself entirely from Europe and settle its future trade relations.²⁰ However, one suggestion must be scotched. One commentator has argued that the United Kingdom cannot legally

¹⁴ P Craig, “Brexit Seminar: Chambers July 19, 2016”, Essex Chambers, para 9 (<https://www.39essex.com/content/wp-content/uploads/2016/07/>).

¹⁵ Ibid, at paras 10-12.

¹⁶ House of Lords Select Committee on the Constitution, *The Invoking of Article 50*, 4th Report of Session 2016-17, HL Paper 44, 13 September 2016, paras 11-13 (<http://www.parliament.uk/hlconstitution>).

¹⁷ “EU officials ‘believe Britain will give up on Brexit if they make negotiations tough enough’”, *The Telegraph*, 15 September 2016 (<https://www.telegraph.co.uk/news/2016/09/15/>).

¹⁸ Ibid.

¹⁹ N Barber, T Hickman and J King “Pulling the Article 50 ‘Trigger’: Parliament’s indispensable Role”, UK Constitutional Law Association blog, 14 July 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

²⁰ “The proud isle that floated free ... hasn’t sunk! No regrets for Greenland since it became the only nation to quit Europe”, *Mail on Sunday* 13 March 2016 (<http://www.dailymail.co.uk/news/article-3489757/proud-isle-floated-free>).

initiate bilateral trade talks while it is engaged in Article 50 negotiations.²¹ The United Kingdom remains an EU member State until the end of the two-year process, and only the European Commission can conclude international trade agreements on behalf of member States.²² This argument fails to distinguish between the negotiating of a trade agreement and its coming into force. No bilateral trade agreement may become operative while Britain remains an EU member State but that does not mean it cannot enter into *negotiations* to conclude the same.²³ In any event, international trade agreements typically take around four years to initiate, negotiate and ratify, which means that no trade agreement would become operative before Article 50 had run its course. But, even under this scenario, the United Kingdom economy will be exposed internationally for considerable time as the trade negotiations grind on.

How long will it take the United Kingdom to negotiate an agreement, settling Britain's future relationship with Europe? That is a crucial question. Unless the European Council unanimously agrees to extend the two-year period, EU treaties and laws automatically cease to apply at the end of that period. Greenland provides the only helpful precedent. It withdrew from the EEC in 1985 following a dispute over fishing rights, and that single-issue dispute took a full two years to resolve. EU bureaucracy is not renowned for clinical efficiency.

Will the United Kingdom seek to enter into preparatory talks in an attempt to reach informal understandings on key issues? Some leading figures have expressed a preference for this stratagem but it is not going to happen. EU leaders have said they will only negotiate once Article 50 is triggered, and that should be "as soon as possible".²⁴ One senses a hardening of attitude across the channel and a resolve to reinforce European unity. Nevertheless, European preferences for early EU-United Kingdom negotiations may prove wishful thinking. Britain, with its dearth of international negotiators, may wish to defer invoking Article 50 for as long as possible. Brexit ministers, David Davis and Liam Fox, must build the institutional capacity quickly if they are to gain negotiating parity.

One final question: Was Article 50 ever fit for purpose? Revelations following the Brexit vote are that it was never designed to be used. Former Prime Minister of Italy, Giuliano Amato, has claimed

²¹ I Dunt, "Everything you need to know about Theresa May's Brexit nightmare", politics.co.uk, 14 July 2016 (<http://www.politics.co.uk/blogs/2016/07/14/>)

²² Under Article 3(1)(e) of the Treaty on the Functioning of the European Union, the EU has "exclusive competence" in the area of "common commercial policy".

²³ Article 207 of the Treaty on the Functioning of the European Union defines the common commercial policy of the Union, and this speaks of "the conclusion of tariff and trade agreements" which would not preclude a withdrawing State from commencing bilateral trade negotiations before the withdrawal takes effect.

²⁴ N Barber, T Hickman and J King "Pulling the Article 50 'Trigger': Parliament's indispensable Role", UK Constitutional Law Association blog, 14 July 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

responsibility for drafting Article 50 and he concedes it was written “largely for show”.²⁵ Amato, who later worked with the European Commission, helped draft the Lisbon Treaty which introduced Article 50 into the European Constitution. He said he had included the article to prevent Britain complaining that there was no mechanism by which it could leave the bloc. So, how fit for purpose is Article 50? Is it realistic to expect a member State to complete its withdrawal within two years? There is growing scepticism within the EU as to whether Brexit can be negotiated within the two-year window.²⁶

E Is legislation required?

I believe that it would be unlawful for the Government to trigger Article 50 without Parliament enacting specific, authorising legislation. Another group of lawyers (including the Government’s lawyers) argue to the contrary; that legislation is not required to trigger the withdrawal process. I will address their counterargument shortly.

I share the view advanced by three public lawyers: Nick Barber (Fellow of Trinity College, Oxford), Tom Hickman (Reader, University College London and barrister at Blackstone Chambers) and Jeff King (Senior Lecturer, University College London).²⁷ This is the burden of their argument: Paragraph (1) of Article 50 states that a Member State’s decision to leave the Union must be made “in accordance with its own constitutional requirements”. This, they contend, throws the focus on to, first, the Westminster tradition of parliamentary supremacy and, secondly, the controlled nature of the royal prerogative in external affairs. Barber et al argue that triggering article 50 would be an exercise of the royal prerogative in external affairs, and that the exercise of the prerogative is subject to and controlled by legislation. They cite the *Case of Proclamations* (1610),²⁸ one of the great cases of the common law, in which 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.”

The Government, under the prerogative, may not take away rights given by Parliament, or undermine or flout its statutes. Such action would expose the rights of citizens to executive whim and would be fundamentally contrary to parliamentary supremacy. As Barber et al expressed it,

²⁵ “Brexit Article 50 was never actually meant to be used, says its author”, *Independent*, 26 July 2016 (<http://www.independent.co.uk/news/uk/politics/brexit-eu-referendum>).

²⁶ “Brexit could be delayed to late-2019 as government not ready – Sunday Times” (<http://www.reuters.com/article/us-britain-eu-timing-idUSKN1000Y9>).

²⁷ N Barber, T Hickman and J King “Pulling the Article 50 ‘Trigger’: Parliament’s indispensable Role”, UK Constitutional Law Association blog, 14 July 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

²⁸ *Case of Proclamations* (1610) 12 Co Rep 74, 77 ER 1352 at 75, 1353.

“statute beats prerogative”.²⁹ They also cite the *Fire Brigades Union Case*,³⁰ which involved the question whether a Minister of the Crown could resolve not to proclaim a statutory scheme in force but implement instead a scheme set up under the prerogative. Lord Browne-Wilkinson stated:³¹

“[I]t 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 expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme.”

His Lordship continued:³²

“The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.”

The European Communities Act 1972 (UK) and other EU-related domestic legislation provide the context for those statements of principle. The 1972 Act facilitated Britain’s entry into Europe and provides for its continuing membership of the EU, and secures automatic application of the EU Treaties without further enactment. To quote Barber et al: “The purpose of triggering Article 50 would be to cut across the [European Communities] Act and render it nugatory ... the 1972 Act would be left as a dead letter.”³³ Consequently, as long as that Act remains on the statute book, the prerogative power to trigger Article 50 is curtailed and cannot be exercised.

It is not necessary to stretch the logic of the argument to embrace the *De Keyser* principle.³⁴ In *De Keyser* Parliament had empowered the executive to carry out acts that it could formerly carry out under the prerogative. The crucial difference was that Parliament had subjected the exercise of the statutory power to conditions (conditions that did not constrain the exercise of the prerogative). In that situation, it would make a mockery of the legislation if the executive could simply fall back upon its prerogative power so as to escape those conditions. The prerogative power is displaced or superseded so long as the statutory power remains in force. That, however, is a very different

²⁹ N Barber, T Hickman and J King “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, UK Constitutional Law Association blog, 27 June 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

³⁰ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL) at 552.

³¹ Ibid.

³² Ibid.

³³ N Barber, T Hickman and J King “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, UK Constitutional Law Association blog, 27 June 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

³⁴ *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508 (HL). See P Craig, “Brexit Seminar: Chambers July 19, 2016”, Essex Chambers, paras 7-8 (<https://www.39essex.com/content/wp-content/uploads/2016/07/>).

scenario from the present. Parliament has not empowered the executive to do anything it could formerly have done under the prerogative; the 1972 Act says nothing about the procedure for withdrawal from the EU Treaties or the Union. Rather, the argument is that the purpose of that Act is to provide for the United Kingdom's continuing membership of the bloc (hence the automatic application of the EU Treaties and laws under the Act), which necessarily curtails the exercise of the prerogative to exit the bloc. The Act and the prerogative are essentially in conflict.

Barber et al dismiss as avowedly "formalist" an argument that there would be no conflict between the prerogative power and the 1972 Act. This argument emphasises that the Act does not purport to regulate the process of withdrawal from the EU (which is true). The executive act of withdrawal, the argument runs, leaves the Act untouched. However, Barber et al rightly observe that this argument discounts the pith and substance of the 1972 Act. As explained above, this Act facilitates the United Kingdom's continuing membership of the EU and secures the direct application of its Treaties and laws. The triggering of Article 50 would take the United Kingdom in the opposite direction – out of the EU. This argument is addressed in the following section.³⁵

What, then, will be required of the United Kingdom Parliament? It will need to confer on the Crown specific legislative authority to invoke the Article 50 process, but paradoxically without affecting the continuing operation of the European Communities Act 1972 and related EU legislation. The 1972 Act could not be repealed until the completion of the Article 50 process. The United Kingdom will remain an EU member in the interim and will continue to rely on the 1972 Act for the direct application of EU law. The authorising legislation, one would expect, may prospectively repeal that Act and related legislation, to take effect upon either the conclusion of a withdrawal agreement or the expiration of the two-year sunset period (whichever is the sooner).

Seven weeks following the referendum, the House of Lords Constitution Committee reported on the steps that it believed ought to be taken to commence Brexit. In its view, it was "constitutionally appropriate" that Parliament should trigger Article 50.³⁶ However, the Committee may have misconceived the need for Parliament's involvement. It believed that that involvement was required as a matter of constitutional comity, not as a matter of legal obligation or necessity. The Committee suggested that Parliament's assent could be obtained in either of two ways: through legislation or

³⁵ See the section headed, "F Contrary argument".

³⁶ House of Lords Select Committee on the Constitution, *The Invoking of Article 50*, 4th Report of Session 2016-17, HL Paper 44, 13 September 2016, para 27 (<http://www.parliament.uk/hlconstitution>). See "PM should seek parliamentary approval; over article 50, says Lords Committee", *The Guardian*, 13 September 2016 (<http://www.theguardian.com/politics/2016/sep13/>).

resolutions tabled in both Houses.³⁷ Resolutions, even if passed unanimously, do not have legal effect and cannot alter the existing law.³⁸ On the argument advanced here, the European Communities Act 1972 would remain an obstacle to triggering Article 50, notwithstanding the resolutions of both Houses.

Strategically as well as legally, legislation should be the preferred mechanism for conveying Parliament's assent. A member State's withdrawal from the Union must be "in accordance with its own constitutional requirements".³⁹ Legislation would enable Parliament to define in law the matters that must be satisfied before Article 50 could be triggered. Dedicated legislation would strengthen the Government's negotiating position, the Constitution Committee observed, "against those in the EU who argue that no negotiations, even informal, should take place before Article 50 has been invoked".⁴⁰ To offset that resolve, legislation might authorise the Government to trigger Article 50 only if the Government had first presented for parliamentary approval the broad outlines of the United Kingdom's future relationship with the EU on which it proposes to negotiate.⁴¹ Such legislation would add to the United Kingdom's constitutional requirements for exiting the Union and would present a *fait accompli* to the UE. The United Kingdom's negotiators would be bound by the legislation and would lack authority to negotiate outside its parameters. However, this approach would require staring down the possibility of failing to secure an acceptable withdrawal agreement at all from the EU negotiators, which would scarcely be in Britain's interests. A sensible bargaining strategy exhibiting a willingness to compromise may be the preferred option.

F Contrary argument

The contrary view is that no parliamentary authorisation is required. The leading proponent is Professor Mark Elliott, a Fellow of St Catharine's College, Cambridge.⁴² The Government's lawyers also subscribe to this view. Elliott contends that there is, in fact, no conflict between the prerogative and the 1972 Act, or any other EU-related legislation.⁴³ He disagrees that triggering Article 50 under

³⁷ *Ibid.*, at paras 36-45.

³⁸ *Stockdale v Hansard* (1839) 9 A & E 1; 112 ER 1112; *Bowles v Bank of England* [1913] 1 Ch 57.

³⁹ Article 50(1) of the Treaty on European Union.

⁴⁰ House of Lords Select Committee on the Constitution, *The Invoking of Article 50*, 4th Report of Session 2016-17, HL Paper 44, 13 September 2016, para 32.

⁴¹ *Ibid.*

⁴² See also See P Craig, "Brexit Seminar: Chambers July 19, 2016", Essex Chambers, paras 6-8 (<https://www.39essex.com/content/wp-content/uploads/2016/07/>).

⁴³ M Elliott "Brexit: On why, as a matter of law, triggering Article 50 does not require Parliament to legislate", UK Constitutional Law Association blog, 30 June 2016 (<https://publiclawforeveryone.com>).

the prerogative would turn the 1972 Act into “a dead letter” (as Barber et al argue).⁴⁴ The Act, he says, “would continue to bite upon a substantial set of EU-related matters”.⁴⁵ For example, under a negotiated withdrawal agreement, the United Kingdom might become a member of the European Economic Area (EEA) (or the “Norway model” as it is sometimes called). As a member of the EEA, most EU laws concerning the single market would continue to apply under United Kingdom law. Or, as Elliott notes, the United Kingdom might even remain a member of the EU, albeit on altered terms. Under these scenarios, the 1972 Act would continue to operate as originally intended. It would not be “a dead letter”.

There is a second string to Elliott’s bow. The 1972 Act is designed to give direct application in domestic law to such rights, powers and obligations as are (to quote the Act) “from time to time provided for by or under the Treaties”.⁴⁶ Elliott explains that, at any time, EU Treaty obligations might cease to apply to the United Kingdom, for example, if the United Kingdom and the EU mutually agree. Such Treaty rights or obligations would then cease to have direct application in domestic law but that would have no effect on the 1972 Act. On that analysis, Elliott says that the 1972 Act and the prerogative are not in conflict: the former does not trump the latter. Rather, they perform complementary functions – one under international law (the prerogative), the other under domestic law (the 1972 Act).

Elliott’s is a plausible argument. However, it is an argument that draws upon a tight, textual interpretation of the European Communities Act 1972 (UK). One is asked to focus solely on the literal legal effect of s 2(1). But is that approach realistic? Brexit is about exiting a supranational political and economic union, not about the legal effect of a particular statutory section (s 2(1)). Lord Wilberforce’s famous expression “the ‘austerity of tabulated legalism’” springs to mind.⁴⁷ The focus should be on the purpose of the European Communities Act 1972 (UK), because this was the legislative vehicle that took the United Kingdom into Europe and provided for its continuing membership. This Act is a “fundamental” constitutional enactment; it defines the status and supranational alignment of the United Kingdom through the direct application of EU Treaties and laws. The decision of the High Court in *Thoburn v Sunderland City Council*⁴⁸ presciently explained the fundamental nature of the Act:

⁴⁴ N Barber, T Hickman and J King “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role”, UK Constitutional Law Association blog, 27 June 2016 (<https://www.ukconstitutionallaw.org/2016/06/27/>).

⁴⁵ M Elliott “Brexit: On why, as a matter of law, triggering Article 50 does not require Parliament to legislate”, UK Constitutional Law Association blog, 30 June 2016 (<https://publiclawforeveryone.com>).

⁴⁶ European Communities Act 1972 (UK), s 2(1).

⁴⁷ *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

⁴⁸ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [62].

“The ECA ... incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.”

That passage exposes the formalism of the argument that collapses the inquiry to the literal legal effect of s 2(1). The long title of the 1972 Act captures the Act’s true purpose: “An Act to make provision in connection with the enlargement of the European Communities *to include the United Kingdom.*”⁴⁹ This purpose squarely places the focus on to the need for parliamentary intervention. As the High Court in *Thoburn* acknowledged, the 1972 Act incorporated into domestic law the “whole corpus of substantive Community rights”,⁵⁰ and the prerogative cannot be exercised so as to extinguish rights or prevent them from applying by overriding a statutory mechanism that provides for automatic incorporation (s 2(1)). Separate authorising legislation will be required before the Government can resort to the prerogative and trigger Article 50. Paradoxically, the 1972 Act will need to remain on the statute book for up to two years, or until a withdrawal agreement is negotiated.

G Legal challenge

Professor Elliott believes, from a legal perspective, that parliamentary involvement is not required in order to commence the withdrawal process. However, he acknowledges the national challenges that the United Kingdom faces. He, in fact, takes a sensible approach: the United Kingdom remains a parliamentary democracy, and (in his words) “it cannot plausibly be argued that the [Brexit] referendum substitutes for proper parliamentary involvement”.⁵¹ Most are agreed that, whatever the strictly legal position, leaving Parliament out of the equation is not an option. Elliott concedes that the United Kingdom is still coming to grips with the volume and complexity of the issues that will need resolving, and he accepts that Parliament should be centre-stage of the upcoming deliberations.

One would expect that Parliament’s early involvement would head off any challenge in the courts. But not so; legal action is already in train. Several members of the London bar have been instructed

⁴⁹ Emphasis added.

⁵⁰ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 at [62].

⁵¹ M Elliott “Brexit: On why, as a matter of law, triggering Article 50 does not require Parliament to legislate”, UK Constitutional Law Association blog, 30 June 2016 (<https://publiclawforeveryone.com>).

to test the Government's resolve (that invoking Article 50 does not require a vote in Parliament).⁵² Lord Pannick QC and Tom Hickman head the challenge brought by the law firm, Mishcon de Reya, which is acting for an investment banker and several unnamed businesses. Six other challenges have also been filed but these will be combined with the lead challenge brought by Mishcon de Reya. On 19 July 2016, two High Court judges set down the fixture to be heard by the Lord Chief Justice Thomas over two days in mid-October.⁵³

The timing of the challenge is acutely important. Lord Pannick told the directions hearing it was "extremely unlikely" that the Government would trigger Article 50 without giving sufficient notice for the High Court to make its ruling. The Government's lawyer, Jason Coppel QC, informed the court that it was the Government's "clearly expressed position" not to trigger Article 50 until sometime in 2017. President of the Queen's Bench Division, Sir Brian Leveson, one of the two judges presiding over the directions hearing, commented that the case was of "such constitutional importance" that it might be appealed directly to the Supreme Court. Lord Pannick opined that a Supreme Court hearing could be held "well before January [2017]".⁵⁴

H Downstream possibilities

The priority the High Court has accorded the legal challenge will ensure developments do not overtake it. Consider, then, the possible scenarios should the challenge succeed (that legislation would be required). The need for a parliamentary vote would throw into sharp relief the strongly-held Remain sentiments of the House of Commons. Two weeks before the referendum vote, *The Telegraph* reported: "Membership of the House of Commons is overwhelming pro-EU, with just over 70 per cent of its present members campaigning for Remain."⁵⁵ Another source put the figure at 75 per cent.⁵⁶ Prime Minister Theresa May would insist that the whips call for a vote strictly along party lines to rein in her pro-EU backbenchers. However, the intensity of feeling at Westminster is palpable and might sorely test party discipline. May might even make the vote a conscience issue and force any recalcitrant backbenchers to weigh the consequences of their actions. Many members in marginal seats may cavil at the thought of another election within two years of the last general election.

⁵² "UK High Court to hear Brexit challenge in October", *Financial Times*, 19 July 2016 (<http://www.ft.com/cms/s/0/d37cf850-4da9-11e6-8172-e39ecd3b86fc.html>).

⁵³ *R (Santos) v Chancellor for the Duchy of Lancaster* Application(s) CO/3281/2016.

⁵⁴ *Ibid.*

⁵⁵ "Pro-Remain MPs could trigger 'constitutional crisis' by using Commons majority to keep Britain in the EU after Brexit vote", *The Telegraph*, 6 June 2016 (<http://www.telegraph.co.uk/news/2016/06/06-ministers-and-pro-eu-mps-could-trigger-constitutional-crisis>).

⁵⁶ "The polls are open. Vote Leave! Or vote Remain!", *The Telegraph*, 6 June 2016 (<http://www.telegraph.co.uk/news/2016/06/06/ministers-and-pro-eu-pms-could-trigger-constitutional-crisis>).

May was a Remain voter who might privately approve of a defeat on the issue. However, as Prime Minister, her instinctual response might be to call fresh elections and retest the mood of the people. However, the Fixed-term Parliaments Act 2011 complicates that default option. This Act introduced fixed-term elections by stipulating that general elections shall be held on the first Thursday in May five years on from the previous general election.⁵⁷ Section 2 of the Act recognises only two “escape” routes: if the House of Commons resolves that it has no confidence in the government, or if it supports an early election by a two-thirds majority vote of its total membership. Presumably, the May Government would not forfeit the confidence of the House over a defeat on a Brexit Bill (assuming the vote was not made a confidence issue). This would leave option two: could the Government amass two-thirds majority support for an early election? Would this be “a bridge too far”? Failure to obtain the two-thirds majority support would leave Brexit in limbo for the remainder of the parliamentary term (until May 2020).

The people “spoke” when they voted for Brexit. In the end, though, the outcome may come down to whether or not Burkean philosophy lives on in the Houses of Parliament. Edmund Burke implored parliamentarians not to sacrifice their “unbiased opinion”, “mature judgment” or “enlightened conscience” to their electors: “Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”⁵⁸ The Brexit referendum was indicative only and not binding, and need not mandate the end outcome. But consider the consequences of voting down Brexit. A defiant House of Commons would trigger anger and resentment, leading to public protest and possibly civil unrest. Britain would be divided as never before.

Ordinary public processes unravel under these scenarios. Much turns, then, on the pending legal challenge, and how the courts will respond to their perception of the national interest. These might be the most important legal proceedings to come before the British courts in a very long while.

I Closing observations

Closing observations seem more fitting than a conclusion for a story that is only now starting to unfold. Brexit was a remarkable national event. It was a monumental miscalculation. Boris Johnson and Nigel Farage adroitly championed the Leave campaign but few foresaw a Leave victory. David Cameron, who promised the referendum, will go down in history as the Prime Minister who took Britain out of Europe. The one official response from Cameron was outside Number 10. He

⁵⁷ Fixed-term Parliaments Act 2011, s 1.

⁵⁸ Edmund Burke, *The Works of the Right Honourable Edmund Burke* (London: Bell & Daldy, 1872), vol 1, p 447 (speech to the electors of Bristol, 3 November 1774).

solemnly announced to the media his resignation pending the selection of a successor. He disclaimed all further responsibility. That was his successor's headache, not his. Johnson's quitting of the leadership contest to succeed Cameron and Farage's resignation as leader of UKIP completed the leadership vacuum that Sturgeon condemned.

The purposeful lack of government planning for Brexit compounded the miscalculation. Astonishingly, there was no "plan B", no "what if" recourse, in the event of a Leave victory. Four weeks after the referendum, the House of Commons Foreign Affairs Committee was treated to an implausible explanation: no plans were ordered as these might leak and then be seen as unwarranted interference in the referendum campaign.⁵⁹ The Committee termed the Government's handling of the matter "gross negligence":⁶⁰

"The [Cameron] Government's considered view not to instruct key Departments including the [Foreign and Commonwealth Office] to plan for the possibility that the electorate would vote to leave the EU amounted to gross negligence. It has exacerbated post-referendum uncertainty both within the UK and amongst key international partners, and made the task now facing the new Government substantially more difficult."

The Committee observed that the Government's plans for Brexit were "tentative and just emerging",⁶¹ although even that may be pitching the matter too high. The Committee endorsed the words of lawyer, David Green: "[I]t is not so much that the UK Government does not have a plan for Brexit – it does not even know what is to go into a plan".⁶² The Committee added: "The new administration has been left to play catch-up."⁶³ The people still await an announcement as to when, or indeed *if*, Article 50 will be triggered. This vacuum is redolent of the lacuna over hung Parliaments, stumbled upon in the lead-up to the 2010 British elections. One of the great gifts the United Kingdom bestowed on its progeny throughout the Commonwealth is the Westminster parliamentary system. Yet, surprisingly, Westminster and the Mother of Parliaments have left parts of their own governance arrangements in a tardy state. Brexit may yet test the patience of the nation.

⁵⁹ "Cameron accused of 'gross negligence' over Brexit contingency plans", *The Guardian*, 20 July 2016 (<http://www.theguardian.com/politics/2016/jul/20>). The explanation was proffered by former Cabinet Office minister, Oliver Letwin.

⁶⁰ See "Government decision not to plan for Brexit", House of Commons Foreign Affairs Committee, 20 July 2016, para 19 (<http://www.publications.parliament.uk/pa/cm201617/cmselect/cmfaaff/431/43106.htm>).

⁶¹ *Ibid*, para 20.

⁶² *Ibid*, para 17, quoting David Allen Green, "David Davis, Brexit and the shapelessness of things to come", *Financial Times*, 14 July 2016.

⁶³ *Ibid*, para 17.

The legal position governing withdrawal from the Union is hopelessly contested. “Hopelessly”, because no agreement is possible over the legal steps that may, or must, be taken. However, differences aside, lawyers from both sides hope that common sense will prevail and that Parliament will be involved from the onset of the deliberations. Even so, Parliament’s involvement will not head off the legal challenge in the courts that is under way. A judicial ruling that made Brexit contingent on the Commons’ support would test the resolve of members who campaigned to retain EU membership. We simply do not know which way the Commons would vote. So, at every level of British institutional life, things are not as settled as they might be.