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A dive into deep constitutional waters:
Article 50, the prerogative and parliament^{*}

INTRODUCTION

The ambiguities surrounding the royal prerogative, including its definition, scope and the roles of both parliament and courts in checking its exercise, may aptly be described as one of the central problems of the UK constitution.¹ This article is concerned with a particular aspect of this problem: the vexed question of the relationship of prerogative powers with statute in the particular context of EU law. This issue has suddenly assumed huge public prominence as a result of the shock victory for the ‘Leave’ campaign in the EU referendum on 23rd June this year, and the indication by the Government that it considers itself to have the existing right under the royal prerogative to ‘trigger’ the formal withdrawal process under the by-the now famous Article 50 of the Lisbon Treaty.² Since it would be relying on the ‘foreign affairs’ prerogative, the Government sees no formal requirement for parliamentary authorisation of such notification, whether in the form of legislation or otherwise.³ This has led to not only intense debate amongst legal commentators, but also to an application for judicial review against David Davis, Secretary of State for Exiting the European Union,⁴ which contends that the Government lacks the lawful power to trigger the

^{*} The author would like to thank Robert Craig, Colm O’Cinneide, Paul Craig, Carl Gardener, Alison Young, Robert Schuetze and the editor and the anonymous reviewer for comments on an earlier draft and Jo Murkens for valuable discussions on relevant EU law points; any remaining errors are the responsibility of the author. All websites cited were last accessed on 12 September 2016.

¹ For a well-known parliamentary critique, albeit one written before some recent reforms, see Public Administration Select Committee, ‘Taming the Prerogative: Strengthening Ministerial Accountability to Parliament’, 4th Report (2003–04), HC 422. See further the Conclusion of this article.

² The Treaty came into force on 1 December 2009. See below at 000-000 for an account of the different provisions of Article 50.

³ See the Written Answer given by FCO Minister Baroness Anelay: ‘The European Communities Act 1972 does not require prior approval of actions by Act of Parliament. The European Union Act 2011 does define some circumstances where this is required, but these do not include a notification under article 50’: HL Deb, WA HL6447 (10 March, 2016).

⁴ *Miller v Secretary of State for Brexit*, case no CO3809/2016. The legal background to the litigation and its progress thus far is explained more fully in the article by Robert Craig in this issue: ‘Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum’ (2016) 00 MLR at 000 (hereafter ‘Craig’).

Article 50 process in the absence of specific parliamentary authorisation granted through fresh legislation. The litigation – and discussion on the legal blogs⁵ - has raised some particularly tricky questions about the relationship between the prerogative, statute and EU law; the latter takes effect in UK law through the European Communities Act 1972, as amended by the European Union Amendment Act 2008 (hereafter, ‘the 2008 Act’), which gave recognition to the Lisbon Treaty, including Article 50, in UK law.⁶ Article 50 has of course never yet been invoked but is now of critical importance to the UK since, as the UK Government has acknowledged, it ‘is the only lawful way to withdraw from the EU’⁷, which the Government firmly intends to pursue.

It is important to stress at the outset that no-one doubts but that the general power to negotiate, enter into and withdraw from treaties arises under the prerogative. As observed in *Wheeler*, ‘Ratification of a treaty is, as a matter of domestic law, an executive act within the prerogative power of the Crown’,⁸ a finding confirmed by numerous other decisions, including that of the House of Lords in *Rayner (Mincing Lane)*.⁹ It has further been recently confirmed that that decisions to enter into treaties, together with the linked rights to negotiate and withdraw from them, are not in themselves subject to judicial review.¹⁰ However, the peculiar feature of the Article 50 question arises from the well-known fact that EU law is given domestic effect via the European Communities Act 1972, thus giving rise to a set of rights that are enforceable in domestic law. This has led to one of the key arguments in the Article 50 debate, based on a general principle of constitutional law stated with particular clarity by the House of Lords in *Rayner*:

⁵ See in particular the series of articles published on the blog of the UK Constitutional Law Association in the weeks following the referendum result: <https://ukconstitutionalaw.org/blog/>

⁶ It did so by adding the Lisbon Treaty to the list of Treaties in s 1 ECA.

⁷ *The Process for Withdrawing from the European Union*, (February 2016), Cm 9216, at [3.2].

⁸ *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin), at [15]).

⁹ *JH Rayner (Mincing Lane Ltd) v DTI* [1990] 2 AC 418, 500.

¹⁰ The treaty-making prerogative was one of the areas identified in the seminal decision in *GCHQ* as being excluded from the ambit of judicial review (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL(E)); the exclusion has been subsequently affirmed in subsequent decisions including *JH Rayner (ibid)*; dicta in the Supreme Court as recently as 2015 confirm it: *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at [237]) (per Lord Kerr.

...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.¹¹

Put shortly, the UK government may not, through exercise of the prerogative, remove domestic law rights. Since the European Communities Act gives domestic effect to the various rights guaranteed to citizens of the member states by EU law, triggering the Article 50 process will, it is said, inevitably result in the loss of some or all of those rights, thus draining the ECA of content and frustrating its core purpose. Hence only parliament, through specific legislation, may authorise the triggering of Article 50.¹²

The starting point of this paper is that this argument (referred to as the ‘frustration argument’) has considerable force and persuasive power and deserves the closest critical and judicial analysis. This article thus disclaims the notion that courts should simply find the claim non-justiciable, instead urging judges to take the plunge into the deep constitutional waters evoked by its title. In seeking to offer such analysis it will first offer a brief account of the content of Article 50. It will then move on to engage closely with the argument advanced in this issue by Robert Craig¹³ that Article 50 has been given domestic effect in UK law by the 2008 and 1972 Acts, so that it already has the status of ‘primary-equivalent legislation’, which directly overlaps with the relevant prerogative, thereby placing it in abeyance. Craig’s argument is worth spending some time on: it is important for a number of reasons to know whether we are dealing with a statutory power (as he claims) or one arising under the prerogative. While conceding the importance of acknowledging the statutory *recognition* thus given to Article 50, it will argue that Article 50 is neither made part of domestic law nor enforceable in domestic courts. It will contend therefore that the triggering power remains within the general prerogative power to conduct foreign affairs. It will then go on to argue that this case is very far from being a straightforward application of the frustration principle and indeed that it contains a number of features that should give courts pause and which may render the principle inapplicable. In doing so it will re-examine

¹¹ n 9 above, at 500.

¹² For the valuable and extremely influential blogpost that first set out the argument properly, see N. Barber, T. Hickman and J. King, ‘Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role’, U.K. Const. L. Blog (27th Jun 2016) (available at: <https://ukconstitutionalaw.org>).

¹³ n 4 above.

one of the key authorities relied on in support of the frustration argument – the *Fire Brigades Union* case.¹⁴

THE NATURE OF ARTICLE 50 AND ITS POSSIBLE STATUS IN DOMESTIC LAW

Article 50: key provisions

Article 50 consists of five paragraphs, making up a complex bundle of rules, procedures and limitations; it therefore needs careful unpacking to establish the different effects the various parts of it may have on the UK legal order.¹⁵ As is now well known, Paragraph (1) states: ‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.’ Article 50(2) provides that once such a decision has been made, the exiting state ‘shall notify the European Council of its intention.’ Despite the imperative language, the consensus appears to be that the UK (in this case) cannot be *compelled* to send a notification under Article 50(2),¹⁶ so that the EU institutions and Member States have no choice but to wait on the decision of the British Government’s in this regard. Paragraph 2 goes on to set out the internal EU procedures by which the Union, through its various institutions, ‘will negotiate and conclude an agreement’ with the exiting state. Thus the European Council will provide ‘guidelines’, and negotiations will then proceed, ‘in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.’¹⁷ Once reached, the 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.’ Article 50(3) then importantly provides:

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

¹⁴ *R v Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513. There are numerous other issues raised by the Article 50 debate on which this article does not touch, including questions raised by the position of EU law in the devolution settlements and consultation with those of the UK’s overseas territories that will be affected by Brexit. The former is valuably discussed by S Douglas-Scott’s article on the same topic in this issue: ‘Brexit, Article 50 and the Contested British Constitution’ (2016) 00 MLR 000.

¹⁵ The entire provision is quoted verbatim in Robert Craig’s article in this issue: see 000-000.

¹⁶ See e.g. M. Elliott: <https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>

¹⁷ Article 218(3) provides that: ‘the Commission shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and....nominating the Union negotiator’...

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

Article 50(4) excludes the exiting state from discussions in the Council concerning it¹⁸ and finally Article 50(5) states that a state that has withdrawn from the EU but wants to rejoin it, has to apply, *de novo*, under Article 49 TEU.¹⁹

It is immediately apparent therefore, that, leaving aside paragraph (1) for a moment, Article 50 deals almost entirely with the internal EU procedures to be followed and the respective roles of the various EU institutions in conducting and concluding the negotiations. In fact, it is an important argument of this article that the *sole* restriction or obligation that it places upon the exiting state is the two year period: this would render a state that sought to conduct an ‘immediate’ exit by simply denouncing the Treaties in breach of EU law – and thus also of international law, since a breach of treaty obligations is always also a breach of public international law.²⁰ In particular, it appears that, while it is overwhelmingly in the *interests* of the exiting state to negotiate to try to secure a withdrawal deal, it is not placed under an *obligation* to do so.²¹ Thus an exiting state *could* in theory simply notify and then sit out the two year wait, making no attempt to negotiate, before leaving with no deal. We will return to the particular significance of this point below.

¹⁸ It also defines ‘a qualified majority’ for the purposes of Article 50(3) by reference to Article 238(3)(b) of the Treaty on the Functioning of the European Union.

¹⁹ One key point is left unresolved: can a Member State that changes its mind about leaving (for example, following a change of government) revoke its notification and thus remain a member of the EU? On this, opinions seem to differ but there is a strong view that such revocation is indeed possible at least in some circumstances. Thus the process is *probably* reversible - at least in some circumstances. For full discussion, see PP Craig, ‘Brexit: a drama in six acts’, (2006) ELR, 447, 463-66.

²⁰ Article 50(2) also requires formal notification, but this is something that would be required even for simply denouncing the treaties outside the terms of Article 50)

²¹ In support of this view Tatham points out Article 50(3) lays the obligation to negotiate and reach an agreement on the Union, not the departing state (A. Tatham, “Don’t Mention Divorce at the Wedding, Darling!” EU Accession and Withdrawal after Lisbon’ in A Biondi et al (eds) *EU Law after Lisbon* (Oxford: OUP, 2012) 128. This is the view expressed by J Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties” ’? (2005) 6 *GLJ* 1755, Hannes Hofmeister, “Should I Stay or Should I Go?”—A Critical Analysis of the Right to Withdraw From the EU’ (2010) 16 *ELJ* 589; A Lazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) 37 *EL Rev* 523, esp. at 527; Hillion also agrees that Article 50 ‘does not require a negotiated withdrawal’ (C. Hillion, ‘Accession and Withdrawal in the Law of the European Union’ in Arnulf and Chalmers (eds) *Oxford Handbook of European Law* (Oxford: OUP, 2015) at 139..

Turning now to paragraph (1), on which most attention has focussed, we may note that it deals with two matters: it decides one as a matter of EU law, but leaves the other to be determined by the national constitutions of its various member states. The one it determines is critically important: it makes clear the right to withdrawal is now a unilateral one: it is not subject to the agreement of other member states and it may not be used by other states to *force* a recalcitrant state to withdraw.²² The second question *raised* by Article 50 is: which body *within* the exiting state may make the 'decision' to leave the EU and by what procedure? However this question is not resolved by Article 50. Indeed Article 50, as part of the TEU, applying to all 28 states of the EU, could not determine the question of who can trigger it, since the answer to that question varies as between the different member states of the EU. Thus Article 50 excludes from its own terms the question of which state organ may bring it into play by coming to a decision to withdraw by providing that it is to be done 'in accordance with [each state's] own constitutional requirements'.²³

In theory it could be argued that what counts, as far as actually activating the Article 50 process, is not the 'decision' to withdraw, which in itself does not set anything in motion, but rather the *decision to send the notification* under Article 50(2). It could then be argued that, on a literal reading of Article 50, the 'own constitutional requirements' proviso only applies to the decision to withdraw, not the decision to send the notification (which is implied by, but not explicitly mentioned in, Article 50). It seems hard to avoid the conclusion that the UK has *already* decided to withdraw from the EU, now that the people have approved that course of action in a referendum and the new Government has formally announced, as it has repeatedly, including to Parliament,²⁴ that the UK is leaving the EU.²⁵

²² There appears to be a consensus that Article 50 does not grant a wholly new right to withdraw, but rather provides a structure and procedures by which the existing right of withdrawal can be exercised. For discussion, see A. Wyrozumska 'Withdrawal from the Union' in H J Blanke and S. Mangiameli (eds) *The European Union after Lisbon* (Springer, 2012); works cited in n 21 above; See also "*The Process of Withdrawing from the European Union*" (HL 138; 2015–16), at 10–13, where Sir David Edward and Derrick Wyatt reach a like conclusion.

²³ The decision of the Court of Appeal in *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 419 confirmed this as the correct reading of Article 50(1) – EU law was held not to be relevant to its interpretation.

²⁴ See e.g. the statement by David Davis to the House of Commons on 5 September 2016, available at: <https://www.gov.uk/government/speeches/exiting-the-european-union-ministerial-statement-5-september-2016>

²⁵ The only way of avoiding this conclusion would be to argue that Parliament has not expressly authorised the sending of the notification. But (a) the argument of this article is that there is no legal requirement for

While of course a decision to withdraw is logically required before one can notify the EU of it, it is the decision to send the *notification* that is the critical one. Unless and until that is sent, the Article 50 process, and in particular the crucial two year time limit, is not activated. Conceivably therefore one could argue that the decision to notify is governed by EU law, not by a state's own constitutional requirements. However, this would be a fanciful reading: the only sensible, purposive reading of Article 50 is that both the decision to withdraw, and the decision to notify are to be made in accordance with national constitutional requirements. The latter, since it concerns the question of when to make a formal communication with an international organisation under a Treaty, plainly also falls, at least *prima facie*, within the prerogative.

Does Article 50 place the prerogative into abeyance? A summary of Craig's argument

At this point it becomes relevant to consider the elaborate analysis of Robert Craig in this issue. We need to know whether we are dealing with a statutory or prerogative power here. His argument in favour of the former may be summarised as follows: (a) Article 50 was given statutory recognition via the 2008 and 1972 Acts, such that (b) it is given effect in UK domestic law, thereby (c) directly overlapping with the existing prerogative power to exit the EU and thus (d) placing that prerogative into abeyance, so that (e) the power to leave the EU has become a statutory power, arising directly under Article 50 as applied in UK Law - although still exercisable by the Executive as the body that deals with foreign affairs under the separation of powers in the UK constitution. This is important to Craig's argument, because, once the power to trigger Article 50 is seen as statutory, it sits on a par (indeed is *part* of) the statutory provisions of the ECA and he thus has an answer to the pro-parliamentary position, summed up in the proposition that 'statute beats prerogative': since all relevant provisions are, on his account, statutory, they are thus on a constitutional par. This is an important argument that raises a genuinely open and novel question of law. The next two parts of the article argue that Craig's analysis is ultimately unpersuasive and that Article 50 has no applicability to national law. However, in recognition of the genuinely open

Parliament to authorise this and (b) as discussed in the text, the decision to withdraw and the decision to send the notification are plainly two separate decisions. The Government at least decided at the latest when Theresa May became the new Prime Minister that the UK was leaving the EU (under Article 50(1)). But, equally plainly, it has not yet decided to send the notification under paragraph 2 and all the indications are that it will not decide to send it this year.

nature of this question, the third part of this section offers an alternative argument in the event that Article 50 *is* found to be in principle so applicable. The conclusion is that the only possible scenario in which domestic courts might enforce Article 50 domestically is one in which the UK government was seeking to act outside it, by initiating an immediate 'hard Brexit'. Needless to say that is a purely hypothetical scenario.

Does Article 50 apply in UK law via the 1972 and 2008 Acts?

The argument that Article 50 is now a statutory power depends upon the notion that Treaty Articles like Article 50 can have effect in UK law. It is of course well known that provisions of the EU treaties *can* have effect in domestic law:²⁶ the traditional test for determining this question is the notion of direct effect,²⁷ which nowadays simply requires that the Treaty provision be clear and precise *enough* to be justiciable in a national court.²⁸ Another school of thought adheres to a stricter test for direct effect, but argues that even when it doesn't apply, the primacy of EU law over national law still applies and arises wherever there is any conflict between an EU law norm and a provision of domestic law.²⁹ However, regardless of which school is right, there is an obvious prior condition to be satisfied before any question arises of a provision in an EU Treaty having effects in domestic law: this is that it is *capable* of having effect in domestic law in the sense that its subject matter could alter the domestic legal position. While EU Regulations are designed specifically to be EU-wide legislation, applying directly and immediately so as to change the law in every member state, treaty articles do not necessarily have this legislative or domestic-norm-creating character. Many do, for example where they limit what a government may do in relation citizens of its own or another EU country (such as forbidding it from charging them customs duties on goods coming into the country)³⁰ or change the rights or obligations that citizens (and private bodies) have in relation to each other (as in the well known requirement that employers ensure they give equal pay as between men and women).³¹

However, there are Treaty provisions that clearly neither confer rights on individuals, nor or in any other way alter the content of domestic law: these are provisions that deal

²⁶ Case 26/62 *Van Gend en Loos*[1963] ECR 1, 12.

²⁷The concept can be applied to Directives, which take the form of a framework which member states should implement through detailed domestic rule-making, but which may also have direct effect: see Case 41/74 *Van Duyn v Home Office (no 2)* [1974] ECR 1337.

²⁸ R. Schutze, *European Constitutional Law*, (Cambridge: University Press, 2012), 314.

²⁹ Lenaerts and Cortaot, 'Of birds and hedges: the role of primacy in invoking norms of EU law', [2006] ELR 287, 299-300 and 315; See also Betlem, 'The doctrine of consistent interpretation – managing legal uncertainty' (2003) 22(3) OJLS, 397-418. Craig places particular reliance on this notion, see 000-000.

³⁰ TFEU Article 49, entitling any EU nationals to start a businesses in any EU state is another obvious example. This was the Treaty Article famously at issue in the *Factortame* litigation; for the best known decision in the saga, see *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

³¹ *Van Gend en Loos*, n 26 above.

exclusively with will be referred to as the ‘internal aspects’ of EU law, such as (for example) the functioning of the European Council³² or the ways in which Member States engage with the EU institutions (e.g. the rules governing voting in the Council of Ministers). Since their subject matter is solely the internal workings of the EU, such provisions could not conceivably alter the content of domestic law. Thus, despite some early dicta of the Court of Appeal in the 1970s³³ that appeared to signal the contrary, we now understand that not every treaty article has effect in UK law via the 1972 Act: in each case, the question depends first on its subject matter.

With this in mind, we may turn to consideration of the possible domestic applicability of Article 50. It is immediately clear that the vast majority of the provisions of Article 50 are solely concerned with ‘the internal aspect’ of EU law and thus have no relevance to domestic law. Obvious examples include the provision in Article 50(2) that the Council will decide on the withdrawal agreement by Qualified Majority, after obtaining the consent of the European Parliament, or 50(4) excluding the exiting state from discussions in the Council concerning it. Are there, though *any* provisions of Article 50 that *do* have possible application in domestic law via the 1972 Act?³⁴ Craig argues that there are. Indeed his claim is that Article 50, as applied in domestic law via the 1972 and 2008 Acts, directly overlaps with the prerogative ‘in a number of ways’ and thus places it into abeyance. In order to consider this argument, we must remind ourselves of the terms of s 2(1) ECA, which provides that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law...

The wording of s 2(1) is rather elliptical, but the key point is that it makes available in domestic law *such of* those rights, obligations remedies etc as are, under EU law, ‘to be

³² TEU, Article 15.

³³ *Application des Gaz SA v Falks Veritas Ltd*, [1974] Ch. 381, esp. 393 and 399; *Bumer v Bollinger* [1974] Ch 401, 418.

³⁴ An obvious candidate *could* have been Article 50(1) concerning the decision to withdraw; but as we saw at the outset, that provision simply returns the question of how the decision is made to the state’s existing constitutional requirements and therefore cannot change domestic law: 000 above.

given legal effect or used in' domestic law without the need for further enactment. That is, it makes 'directly effective' EU law available in UK law, in accordance with what EU law itself requires.

Craig's general argument is that 'the prerogative of managing treaties, including exit, is constrained [by Article 50] in an EU context.'³⁵ Thus he contends that Article 50 'confers a right', within the meaning of s 2(1) upon the UK (and hence the Executive) to trigger a lawful exit from the EU.³⁶ He also suggests that Article 50 may be seen as providing a 'procedure' for exiting under s 2(1); and that it provides a 'restriction' on the previously untrammelled prerogative to leave the EU. Craig gives the example that, 'under the prerogative, the Crown could exit the EU Treaties immediately. Under Article 50, via the ECA, the Crown must wait, perhaps, for two years'.³⁷

The most direct response to this analysis is to say that it simply conflates the effects that Article 50 has on the UK as a state *in international law* with the domestic law position. In other words, while Article 50 undoubtedly places legal constraints upon the UK's freedom of action, all of these operate at the level of international law, not within domestic law. Article 50 does what most treaty provisions do: it voluntarily limits some of the things the UK may do as a state on the international plane. In this case, it has agreed to follow a procedure laid down for leaving an international organisation, the EU, thus limiting whatever previous right the UK had, in international law, to leave the EU without a specified procedure. But unless every signing of a treaty involves surrendering part of the prerogative, this one does not do this either. Agreeing to Article 50 is not a surrender, but an *exercise* of the prerogative for what is no more and no less than its standard purpose – to modify the obligations binding upon the UK at the international plane.³⁸

It might be thought that the above misses an obvious point. Yes, other treaty obligations only affect the UK on the international law plane, but the whole point is that *EU*

³⁵ Craig, at 000.

³⁶ *ibid*, at 000.

³⁷ *Ibid* at 000.

³⁸ See *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, at 570) in which Lloyd LJ said: 'As [Counsel] succinctly put it, Title V [of the Maastricht Treaty] does not entail an abandonment or transfer of prerogative powers; but an exercise of those powers. We agree. So far as we know, nobody has ever suggested that the Charter of the United Nations, for example, or of the North Atlantic Treaty Organisation, involves a transfer of prerogative powers'.

law is different – it is given domestic effect via the 1972 Act. To which the response is simple: the 2008 Act *recognises* Article 50 in domestic law but it can only have *effect* through the 1972 Act if it alters the *content* of domestic law. And Article 50 does not do so for the simple reason that it has nothing to do with domestic law.³⁹ All Article 50 has done is to change how, under EU law (and therefore international) law, a state may leave the EU. It cannot, therefore have any effect upon the existing prerogative, which is the general power that domestic law affords the Executive to conduct foreign affairs. But domestic law is not concerned with the numerous international law constraints, accepted by the UK through the numerous treaties it has signed, that rightly affect how that prerogative is exercised. Article 50 is nothing more or less than another treaty-based, international law restraint: to assert its domestic effect via the 1972 Act is to chase a chimera.

Craig relies specifically on the view of a leading EU law scholar that, ‘Today almost all Treaty *prohibitions* have direct effect – even the most general ones’⁴⁰ and notes that, since Article 50 *prohibits* the UK from leaving the EU immediately, it may be said to have direct effect in UK law. Again, however the response is that the ‘prohibition’ in question must be a prohibition applying to things done in the domestic-law sphere, such as a prohibition on a government charging citizens less than the specified rates of VAT.⁴¹ However, it might be argued that that leaving the EU may have the eventual effect of extinguishing a number of rights that are currently available in domestic law and that the ‘prohibition’ on an immediate exit is designed to give protection to those rights; hence a possible field of application for Article 50 in domestic law could be established, opening the door for it take effect via the 1972 Act. However, the removal of such rights could occur whether or not the Article 50 process was used to withdraw. Using Article 50 does not prevent such rights from being extinguished, particularly given that Article 50 does not even require the departing state to *attempt* to negotiate a withdrawal agreement that might retain some of them.⁴² Hence the better view is that the prohibition on immediate exit – the only part of Article 50 that in fact imposes any restriction on a state’s freedom of action – is one that operates only

³⁹ With the exception of the decisions to withdraw and to notify, which, as argued above are both referred back to a state’s *existing* constitutional requirements; these therefore also do not alter the content of domestic law.

⁴⁰ R. Schutze, *European Constitutional Law*, (Cambridge: University Press, 2012), 314.

⁴¹ Council Directive 2006/112/EC.

⁴² Above, n 21.

at the level of ‘international’ EU law. The point may be seen by comparing the various restrictions placed by successive implementing statutes on the ability of successive British governments to take specified actions in relation to the EU without specific parliamentary authorisation.⁴³ On the one hand, the restrictions relate to things the UK might do at the international level. But on the other, the restrictions clearly sound in domestic law since they specify something that can *only happen* in domestic law: authorisation by the UK Parliament. In contrast the restrictions in Article 50 do not appear to overlap with the domestic law prerogative but only restrict what the UK may do as a matter of ‘internal EU law’; hence there is no question of the prerogative being ‘replaced’ by Article 50.

Comparison with other cases of abeyance

One of Craig’s further arguments is to say that those who see the prerogative as still governing the domestic law aspects of withdrawal are characterising the prerogative, or some ‘residue’ of it, as ‘sitting behind Article 50’. In attempting to show that such a view is mistaken, he offers a comparison with the Fixed-term Parliament Act 2011 (FTPA), arguing such a mistake would be similar to suggesting that there is a residual prerogative to dissolve Parliament still lurking behind the FTPA. It is submitted, however that the comparison with the FTPA shows the precise opposite. Recall that a statute may abolish – put into ‘abeyance’⁴⁴ – a prerogative by covering the same area with detailed provisions. It is clear from case-law that, in such a case, the prerogative legally disappears from the scene, and the matter is straightforwardly governed by the provisions of the statute.⁴⁵ However, if on construction of the statute, it has not abolished or displaced the prerogative, but merely contains one or more provisions with which certain *exercises* of the subsisting prerogative could come into conflict, then the position is governed by the principle that has been clear

⁴³ See below at 000 and 000-000.

⁴⁴ I leave aside the debate as to whether, if a statute that impliedly abolished a prerogative power was itself repealed, the prerogative would ‘spring back to life’. Craig evidently thinks it would, which is why he refers to prerogatives going into ‘abeyance’ rather than being abolished. I would take a contrary view but it is not necessary to resolve this issue for current purposes save to note that Lord Browne-Wilkinson in the *Fire Brigades Union* case refers to prerogative powers remaining in existence ‘to the extent that Parliament has not expressly or by implication *extinguished* them’ (n 14 above, at 552, emphasis added)

⁴⁵ The principle established by the well known decision in *Attorney General v De Keyser’s Hotel* [1920] AC 508, 540 (HL).

since *Laker Airways*:⁴⁶ the prerogative may not be exercised so as to *frustrate* a provision in a statute.⁴⁷ Thus it all depends on the construction of the statute.

In the case of The Fixed-term Parliament Act 2011, it seems tolerably clear that it straightforwardly abolished the former prerogative of dissolution, whereby the Queen could dissolve Parliament at will (but, by convention, did so only at the request of the Prime Minister). This abolition stems very directly from section 3(2) of the Act, which comes after section 2 sets out the two different ‘triggers’ - ways in which Parliament can itself bring about its early dissolution.⁴⁸ Section 3(2) then states simply, ‘Parliament cannot otherwise be dissolved.’ This must be taken to have abolished the dissolution prerogative by necessary implication, a finding confirmed by the Explanatory Notes to the Act, which say its overall effect is that, ‘The Queen does not retain any residual power to dissolve Parliament’;⁴⁹ the specific Note on section 2(3) explains it as meaning that, ‘the Queen will not be able to dissolve Parliament in exercise of the prerogative.’⁵⁰ Thus the only way of contending that the prerogative survives the FTPA would be to argue that section 2(3) doesn’t *in express terms* abolish the prerogative. However, this would take one to the constitutionally perilous doctrine of holding Parliament to be unable to abolish the prerogative unless it does so expressly. Since Parliament is able to repeal primary legislation impliedly, this would elevate the prerogative to a higher status than statute, which would be plainly contrary to the constitutional fundamental of parliamentary sovereignty by which, statute ranks higher than prerogative. Assuming that argument to be wrong therefore, consider the case of someone who wanted to argue that the FTPA did not *abolish* the dissolution prerogative, but rather that the prerogative still existed but simply couldn’t be exercised in a way that was contrary

⁴⁶ *Laker Airways v Department of Trade* [1977] QB 643.

⁴⁷ Craig’s article valuably explains the distinction between abeyance and frustration in more detail and re-arranges the case law, including decisions such as *ex parte Rees Mogg* (n 38 above) so as to show how best they can be understood. His analysis in particular demonstrates how the *Fire Brigades Union* case would have been properly classified as an abeyance case had the statutory scheme for criminal injuries compensation been in force; since it was not, the case was a frustration one – the exercise of the prerogative in that case was found to have frustrated the performance of the Secretary of State’s duty under the in-force commencement clause. This case is discussed further below at 000-000.

⁴⁸ These are the first, a vote to dissolve Parliament by 60% of MPs; second, the passing of a motion of a no confidence in the Government, and the absence, within a period of 14 days, of a motion of confidence in a new Government (in both cases the FTPA sets out the required wording of the motions).

⁴⁹ Fixed-term Parliaments Act 2011, Explanatory Notes, at [6], available at

<http://www.legislation.gov.uk/ukpga/2011/14/notes/division/6/3>

⁵⁰ *Ibid* at [31].

to the 2011 Act. The argument would be an absurdity: given what the Act says, there are *no* circumstances in which the dissolution prerogative can be used at all.⁵¹ It must therefore be taken to no longer exist.

The comparison with Article 50 is striking. Not only is there no mention anywhere of any intention to abolish or restrict the prerogative, but it takes Craig many pages to put together his intricate, four-stage argument by which he reaches the conclusion that Article 50 has, through a complex combination of EU constitutional doctrine, domestic constitutional law, the ECA 1972 and the 2008 Act, put the relevant prerogative into abeyance. The contrast with the terse and straightforward statement in section 3(2) FTPA that disposes of the dissolution prerogative – ‘Parliament cannot otherwise be dissolved’ – could hardly be stronger. Furthermore, the case-law on abeyance shows that the courts require fairly clear evidence of a parliamentary intent to extinguish the prerogative. One view is that the courts have in some cases gone as far as requiring ‘express repeal’ of the prerogative – thus erroneously elevating prerogative powers above statutes, which *are* subject to implied repeal;⁵² this however rests upon a superficial reading of the case-law. It is true that in *Northumbria Police Authority*,⁵³ which in part concerned the question of whether the prerogative of keeping the peace had been put into abeyance by the Police Act 1964, Croom-Johnson LJ said that the relevant provision did not ‘expressly grant a monopoly’ of power in the area to the Police Authority – but then immediately went on to add ‘and there is every reason not to *imply* a Parliamentary intent to create one.’⁵⁴ Thus his approach – and those of his brethren – remained one of simply construing the intention of

⁵¹ Section 2(7), which applies following a decision by Parliament to dissolve itself using one of the two ‘triggers’ in ss (1) and (3), provides for the Queen to set the precise date of the next election on the advice of the PM; since it only arises once the key statutory tests for dissolution have been met, it is plainly a circumscribed power granted by the terms of the Act itself, not a ‘residue’ of the dissolution prerogative.

⁵² I. Loveland, *Constitutional and Administrative Law* (Oxford: OUP 5th ed, 2009) at 102.

⁵³ *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26.

⁵⁴ *Ibid*, at 45. Almost the same phrase was used by ‘there is every cause not to imply a Parliamentary intent to create a monopoly’ (at 34). Purchas LJ similarly said that the statutory provisions ‘must fall short of an express and unequivocal inhibition sufficient to abridge the prerogative powers’ (at 53); but the word ‘express’ here plainly does not mean ‘express repeal of the prerogative’ but rather an express prohibition upon the Home Secretary from supplying riot equipment; such an express prohibition would have impliedly displaced the prerogative.

the statute overall – and finding insufficiently clear evidence of parliamentary intention to abridge or remove the prerogative.⁵⁵

A second notable case is *ex parte Rees Mogg*,⁵⁶ which as Craig notes, was concerned with a rather similar issue to the instant one – in that case a challenge to the ratification of part of the Maastricht Treaty. Once again, the court did not find sufficiently clear evidence of intention to abridge the prerogative. Indeed, there were contrary indications, given that:

When Parliament wishes to fetter the Crown's treaty-making power in relation to [EU] law, it does so in express terms, such as one finds in section 6 of the [European Parliamentary Elections Act 1972, provided that certain treaties could not be ratified without express parliamentary approval]. Indeed, as was pointed out, if the Crown's treaty-making power were impliedly excluded by section 2(1) of the Act of 1972, section 6 of the Act of 1978 would not have been necessary. *There is in any event insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative to alter or add to the E.E.C. Treaty.*⁵⁷

Thus the fact that Parliament, which in this area has placed several specific restrictions on the prerogative in statute, had not done so in this instance, was taken as evidence that no such restrictions were intended by implication.

The overall lesson from these cases then is that the courts have required clear evidence of parliamentary intention to abrogate the prerogative in order to hold it extinguished or placed into abeyance. It is submitted that the ambiguous status of Article 50 in domestic law comes nowhere near crossing this hurdle. Indeed it strains belief to suggest that parliament intended, by this indirect route, to replace the domestic prerogative power to exit the EU with Article 50.⁵⁸

⁵⁵ The Court of Appeal judgment of course remains open to the criticism of construing the statute in a way that was extremely accommodating to the Home Secretary's and his ability to use a little known and vaguely-defined prerogative in order to supply riot equipment to Chief Constables outside the relevant statutory provisions.

⁵⁶ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

⁵⁷ *Ibid* at 567 (my emphasis).

⁵⁸ Craig has a final argument (at 000) offered precisely in response to such an argument: that the *Simmenthal* principle (*Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629) must be used under s 3(1) ECA so as to interpret and apply relevant domestic law in a way that avoids impeding any EU law objective. The author would retort that the arguments advanced in this paper against construing Article 50 to be part of domestic law offer no impediment to the implementation of Article 50, since it may simply be triggered under the prerogative. Hence there is no 'gap' for *Simmenthal* to fill. If *Simmenthal* does have a role

The conclusion to this section is therefore that Article 50 is not applicable in domestic law under the terms of either the ECA 1972 or the 2008 Act. As a result it does not alter the substantive content of the domestic law prerogative or come into conflict with it. The power to trigger Article 50 therefore remains under the prerogative.

An alternative argument: Article 50 imposes a single statutory constraint on the exercise of the prerogative

Having proffered this conclusion, it must however be conceded that the status of Article 50 in domestic law is a difficult and novel point of law and others – including the courts – might well find Craig’s argument persuasive. In particular, it could be argued that the prohibition on immediate exit in Article 50(3) is intended partly to protect the position of citizens of the departing and other member states from the adverse consequences of a sudden and disorderly exit and thus *could* be seen as being apt to take effect in domestic law and be enforced by domestic courts. Therefore the following argument is offered to deal with the alternative scenario in which a court *is* prepared to hold Article 50 applicable in domestic law.

The starting point of this argument is the observation that, even if Article 50 is *capable* of applying domestically, it plainly represents nothing like the kind of detailed statutory code that was present in *de Keyser’s Hotel*⁵⁹ and that we saw in the Fixed-term Parliaments Act 2011. While there are a number of detailed provisions in Article 50, the analysis above reveals that it contains only in fact a single rule that represents even a possible domestic law constraint on the prerogative: that is the requirement in Article 50(3) of a two year wait before a state can leave the EU.⁶⁰ Even if this restriction may be seen as

to play, it may be in Craig’s final argument – that it could require the disapplication of the frustration principle itself, if it was seen as standing in the way of the triggering of Article 50.

⁵⁹ It was made up of the Defence Act 1842, as consolidated and extended by the Defence of the Realm (Consolidation) Act 1914, which together gave the government extensive powers of requisition, but constrained by ‘quite rigorous procedural conditions’ (Loveland, n 52 above, at 96). *De Keyser’s* is cited as the case that establish that where statutory provisions cover the same ground as the prerogative, they send it into abeyance.

⁶⁰ The requirement to notify the EU of the decision to leave in paragraph (2) cannot be considered to be a ‘constraint’: even if the UK wished simply to denounce the EU Treaties outside Article 50 it would have to do this through *some* form of notification. And it was noted above (n 21) that Article 50 places no legal *requirement* on the exiting state to negotiate, or even seek to negotiate, a Withdrawal Agreement

biting on the prerogative as a domestic law power, it cannot sensibly be seen as ‘replacing’ the prerogative. Indeed there is no ‘prerogative to exit the EU’ (anymore than there is ‘a prerogative to denounce the European Convention on Human Rights’): rather both are simply particular *uses* to which the *general* prerogative of managing foreign affairs can be put. As such, there is no question of this prerogative being placed into abeyance by a single two-year time limit rule wait. It is of course possible that the prerogative could alternatively be used so as to flout or frustrate this rule. But this could only happen in one implausible hypothetical scenario in which the UK Government was (a) purporting to execute an *immediate* exit outside the terms of Article 50, but (b) without *first* procuring the repeal of the ECA.⁶¹ Not only is this a purely hypothetical scenario, but we know that there is no chance of it materialising. The UK Government has quite properly said that it regards the Article 50 process as the *only* lawful and legitimate way of withdrawing from the EU and that it believes the formal negotiating process that only triggering Article 50 can activate to be vital to its declared intention of securing the best possible deal for the UK.⁶² Thus in the *actual situation* with which we are concerned – as opposed to an extreme and implausible hypothetical - the UK Government proposes doing nothing at all to flout or frustrate the two year rule in Article 50. On the contrary, its declared position is to act in full compliance with it.⁶³ In conclusion then, even if Craig is right, and Article 50 could in principle be applicable in domestic law, not only does it not ‘replace’ the prerogative, but there is no prospect at all of the single applicable rule it contains being frustrated or flouted by government use of the prerogative. So the slightly paradoxical conclusion that is reached is that Article 50 would only have any *possible* application in domestic law if the British Government was seeking to withdraw from the EU act outside its terms.⁶⁴ Since on the contrary, the Government has

⁶¹ And other relevant legislation such as the European Parliamentary Elections Act 2002. In theory such a ‘hard Brexit’ could be done either before triggering Article 50, or after doing so but before the two years were up.

⁶² Even in such an extreme scenario, it may be doubted whether the courts would grant an injunction that prevented the Crown from denouncing a treaty – thus *compelling* the UK Government to remain a party to a Treaty that it wished to withdraw from. A court *might* possibly grant such an injunction on the *sole* ground that an immediate hard Brexit would *itself* tear up various individual rights and obligations protected under statute – the 1972 Act. But if it did so on that ground it would be applying the ordinary frustration argument deriving from *Laker Airways* and *FBU*, not enforcing Article 50(3) domestically against the Crown.

⁶³ See *The Process for Withdrawing from the European Union*, (February 2016), Cm 9216, at 7 and 13.

⁶⁴ In reliance on the doctrine of primacy of EU law (see text to nn 28 and 29 above). Alison Young has suggested to me that one could view the sole possible effect Article 50 could have in UK law as being to exclude legislative or executive decisions that were contrary to it.

publically committed itself to acting wholly *within* the procedure laid down by Article 50, that provision has no application on the facts in domestic law. It follows in turn that the prerogative power to trigger Article 50 remains unaffected at the domestic law level by Article 50. We may now therefore turn to the question of whether the use of the prerogative to trigger the Article 50 process would, as has been claimed, be unlawful.

NON-JUSTICIABILITY OR WARINESS?

“It behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so” (*R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657, 666 Sir John Donaldson MR)

Two reasons for courts to tread warily

The Introduction to this article noted above that the prerogative of treaty-making *per se* is a non-justiciable area, as it concerns matters of high policy and the conduct of foreign relations.⁶⁵ However, an exception to this must arise where it is argued, as in this case, that withdrawal from a Treaty would directly cut across, or even remove rights enjoyed in domestic law or would otherwise frustrate the purpose of a statute.⁶⁶ Since just such an argument is seriously advanced in this case, it requires proper consideration: for courts to hold the whole issue non-justiciable would be the wrong approach and would fail to do important judicial work in clarifying the still murky world of the prerogative and its relationship with statute. Instead, the judges should take a deep breath and plunge into the deep constitutional waters invoked in the title of this paper. However, the question that next arises is: what should their attitude be? Should they be wary of intervening in this case - or confident that such intervention would be nothing more than the performance of their ordinary role? Should they therefore be prepared to rule against the government even if they find the arguments for so doing only marginally more persuasive than those against? Or should they resolve doubt in favour of non-intervention?

⁶⁵ n 10 above.

⁶⁶ In *Wheeler*, (n 8 above at [55]) it was said: ‘That such a decision [to ratify a treaty] is not altogether outside the scope of judicial review is illustrated by the fact that s.12 of the European Parliamentary Elections Act 2002 makes statutory approval a condition precedent to the ratification of any treaty which provides for an increase in the powers of the European Parliament: [Counsel] realistically conceded that a decision to ratify without such approval would be amenable to review.’

This paper suggests two key reasons why courts should tread warily. First, as we know, courts have been historically very reluctant to intervene in the realm of foreign relations.⁶⁷ While particular decisions have been criticised in this regard,⁶⁸ it is suggested that courts are right to be cautious where an adverse ruling risks embarrassing the UK government, or in particular interfering with its ability to conduct foreign relations through fruitful negotiations with foreign governments or international organisations. A ruling that the Government is unable lawfully to trigger Article 50 without specific authorisation in fresh primary legislation risks doing both, especially given that such a ruling would hand Parliament, including the House of Lords, the power to delay the triggering of Article 50, perhaps very substantially, while also hampering the ability of the Government to choose the moment that in its view was the most propitious one to start the exit process. As one distinguished MEP has already commented: ‘The longer the new British prime minister delays invoking Article 50, the more will Europe’s political and constitutional crisis escalate.’⁶⁹ The UK Government is already under considerable pressure both from the EU institutions and the member states to ‘get on’ with triggering Article 50⁷⁰ and one can only imagine the exasperation and anger in Brussels and numerous other European capitals were the courts to hold that the Government had misconstrued its own constitution and was now obliged to introduce into Parliament a statute authorising the triggering of the exit process, given the strong likelihood that this would mean still further substantial delay. Thus this aspect of the case seems to provide a good reason for a cautious approach by the courts.

The second reason invokes the quotation from *ex parte Smedley* noted at the beginning of this section. The author of this paper believes that, as a matter of

⁶⁷ This may be seen in the fact that, while there has been an extension of judicial review into areas concerning the UK’s foreign relations that would have been considered forbidden, none of the challenges have actually succeeded: see *R (On The Application of Bancoult) v Secretary of State For Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 AC 453; *R on the Application of Abbasi and another v Secretary of State for Foreign and Commonwealth Affairs CND* [2002] EWCA Civ 1598; [2003] UKHRR 76; *R (Al Rawi) v Foreign Secretary* 2007] 2 WLR 1219; , *CND v The Prime Minister of the United Kingdom and others* [2002] EWHC 2759, QB.

⁶⁸ See e.g. M Elliott and A Perreau-Saussine, ‘Pyrrhic public law: *Bancoult* and the sources, status and content of common law limitations on prerogative power’ [2009] PL 697..

⁶⁹ A Duff, ‘Everything you need to know about Article 50 (but were afraid to ask)’ (4 July 2016), available at <http://verfassungsblog.de/brexit-article-50-duff/> (last visited 12 September 2016).

⁷⁰ See, e.g. the reported comments of Donald Tusk, President of the European Council, that Theresa May should trigger Article 50 ‘as soon as possible’: ‘Donald Tusk tells Theresa May “the ball is in your court” as he urges Britain to trigger Article 50’ *Telegraph* 8 September, 2016.

constitutional principle, it is right that the Government, which must command the confidence of the Commons, should not take a step as momentous as triggering the Article 50 exit process without in some way seeking the approval and consent of the Commons. However, this paper would contend that this is a general principle of constitutional morality, the operation of which should be worked out by the two democratic branches – Executive and Parliament – concerned. As the Lords Constitution Committee has put it, ‘Parliament and the Government should discuss and agree the role each will play in the withdrawal process as a whole’.⁷¹ The courts should therefore be slow to intervene in a matter that can properly be determined by discussion between the democratic branches unless *certain* that the law requires them to do so. In this regard it is worth noting that, should Parliament *wish* to exert control over when Art 50 is triggered, it has its own ways of doing so. These include calling for such a vote through reports of its Select Committees,⁷² scheduling a debate on the matter through the Back-Bench Business Committee or even passing a Resolution *requiring* that Art 50 not be triggered without its consent. As we saw with David Cameron’s shock defeat on the vote on military action against Syria in August 2013 and its aftermath,⁷³ a Prime Minister, faced with a clear vote in House of Commons opposing his proposed course of action, is most unlikely to press ahead with it, even when legally free to do so. And, ultimately, of course the Commons can bring down a government that threatens to defy its will with a motion of no confidence.

In the well known *Fire Brigades Union* case, Lord Mustill noted in this regard that Parliament, is ‘jealous...of its prerogatives and [is] possessed of its own special means to scrutinise and control the actions of ministers’.⁷⁴ That decision is well worth re-examining in relation to this issue, for two reasons. First, it similarly involved an intervention of the court between parliament and the government that was controversial enough to divide both the Court of Appeal and the House of Lords⁷⁵ and to provoke serious academic criticism;⁷⁶

⁷¹ Select Committee on the Constitution, ‘The invoking of Article 50’ (4th Report of 2016-17), HL 44 at [25]. This Report sets out a range of options by which Parliament could be involved in authorising and overseeing the withdrawal process.

⁷² See e.g. *ibid.*

⁷³ On which, see G. Phillipson “‘Historic’ Commons’ Syria vote: the constitutional significance (Part I)” UK Const. L. Blog (19th September 2013), available at <http://ukconstitutionallaw.org>.

⁷⁴ *R v Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513, 562 (hereafter, ‘FBU’).

⁷⁵ The Court of Appeal divided 2:1; the House of Lords 3:2.

second, reliance has been placed on the decision by those arguing in favour of judicial intervention.

Lessons from the *Fire Brigades Union* decision.

This decision concerned a situation in which Parliament had passed legislation designed to place criminal injuries compensation – then provided under a scheme established under the prerogative⁷⁷ – on a statutory footing. However, as is not uncommon, the relevant provisions were not brought into force immediately or even at a fixed date thereafter. Instead the Act provided, per section 171, that the relevant provisions ‘shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint’. However, the Government, after some years, decided that the statutory scheme would be too expensive. It therefore announced that the relevant provisions would not be brought into force and would instead be repealed; further, that it proposed to set up a less generous ‘tariff’ scheme under the prerogative. The House of Lords found by 3:2 that in essence, the commencement clause gave the Home Secretary a discretion as to *when* to bring in the legislation, but not *whether* to bring it in.⁷⁸ Thus, while holding that the House would not *compel* him to bring the scheme in at any particular point in time, the majority ruled that he was nevertheless under a continuing duty to keep under consideration when the scheme should be introduced. By stating that he was *never* going to bring in the provisions and using the royal prerogative to set up a scheme that was radically inconsistent with them, therefore made it difficult if not impossible ever to bring them in, the Home Secretary had acted in violation of the duty laid on him by the in-force commencement clause.

Thus on one view, the decision represented a bold intervention in a dispute between the two democratic branches of government – just as in our case concerning Article 50 – and shows how deeply controversial such an intervention can be. Lord Keith in dissent did not just disagree with the majority but said that he regarded its ‘interference’ as ‘a most improper intrusion into a field which lies peculiarly within the province of Parliament’.⁷⁹

⁷⁶ See below, at n 82.

⁷⁷ Whether it was strictly speaking set up under the prerogative has been academically (though not judicially) doubted: see e.g. W. Wade, *Constitutional Fundamentals* (London: Stevens, 1989) at 58-66.

⁷⁸ As it was put *ibid* at 570-71, per Lord Lloyd.

⁷⁹ *Ibid* at 544.

Lord Mustill regarded the majority decision as involving ‘a penetration into Parliament’s exclusive field of legislative activity far greater than any that has been [previously] contemplated’⁸⁰ and in particular saw the court’s intervention as both unnecessary and constitutionally impertinent – and this in an area of relatively low public visibility and political controversy! His Lordship indeed said, in dicta that could well be applied to the current case, that ‘If the attitude of the Secretary of State is out of tune with the proper respect due to parliamentary processes, this is a matter to which Parliament must attend.’⁸¹ One of the UK’s leading constitutional lawyers, Adam Tomkins has also criticised the decision as an unwarrantable interference by the courts between the democratic branches,⁸² echoing the criticisms of Lord Mustill. In particular, Tomkins argues that it was a ‘serious oddity’ for the majority, *even if they were right* in construing the legislation as evincing a parliamentary intention that the Minister *should* bring the legislation into force at some point, not to ask ‘on what authority is it an expectation which is to be judicially enforced’.⁸³ Where, in short were the precedents to justify what the House of Lords had done?

My purpose in considering this case is not to join in criticism of the decision but rather to show how it was justified by a factor that is arguably not present in the Article 50 case: namely the presence of a straightforward statutory duty on the Minister which was deduced by the courts doing nothing more than their ordinary job of construing an (in-force) provision in a statute – the commencement clause. For it is crucial in considering this case to recognise that, as Lord Browne-Wilkinson put it, the different aspects of the Home Secretary’s decision were ‘inextricably interlinked and the legality of the decision to introduce the new tariff scheme must depend’ on the lawfulness of the decision ‘not to exercise...the power or duty conferred on [the Home Secretary]’ by the commencement clause.⁸⁴ Thus the entire judgment of the majority rested ultimately upon the construction they placed on this statutory provision. And, while one might disagree with them (and with Bingham LJ in the Court of Appeal) on this, it is impossible to say that the interpretation was

⁸⁰ *Ibid* at 562.

⁸¹ *Ibid* at 560.

⁸² A. Tomkins *Public Law* (Oxford: Clarendon, 2003) at 28-30. Tomkins is of course a well known sceptic of judicial interventionism.

⁸³ *Ibid* at 29.

⁸⁴ *FBU*, at 540.

strained or implausible: it was based on the unexceptional notion that if Parliament goes to the trouble of passing legislation in each House through all the stages required, then it is reasonable to assume that it intends those provisions 'to become part of the law of the land'.⁸⁵ The contrary suggestion, made by the minority and by Tomkins, is that Parliament passes legislative provisions, but unless it brings them into force immediately (or on a fixed date in the future) it is thereby taken to have handed 'a complete and unfettered discretion'⁸⁶ to the Executive as to when *and whether* the legislation is ever commenced.

In short, the majority did nothing more than (a) construe an ordinary provision in an Act of Parliament, (b) conclude whether it laid a legal duty on the Home Secretary and (c) decide whether by his actions he had breached that duty. All of these steps were, as Lord Lloyd pointed out, part of the courts' 'ordinary function'.⁸⁷ In response to Tomkins, it may be said that no specific precedent was required: the proposition that a Minister must comply with a duty laid upon him by statute is an elementary aspect of the rule of law and does not require specific authority.

This article spent some time on the *FBU* case, precisely in order to show that a decision that at first sight looks similar to this scenario is in fact very different, resting as it did on what was at bottom a fairly mundane exercise in ordinary statutory interpretation. The question that arises is whether in the current case the courts can find the kind of clear legal basis for an intervention that would otherwise undoubtedly cause far greater controversy than did the decision in the *FBU* case. The following section suggests a number of reasons to be doubtful that they can. Of course it could be argued that the courts' intervention is required precisely because the Article 50 decision is so much more important than what was at stake in *FBU* and that their intervention would be democracy-promoting, in requiring parliamentary input into the decision.⁸⁸ But in response it may be said that the sheer momentousness of what is at stake makes it all the more important that the courts only do intervene if they are fairly *certain* that the law requires them to; moreover, in the absence of such certainty courts are likely to be drawn to the argument that, precisely

⁸⁵ *Ibid* at (520) (per Bingham LJ). As Lord Nicholls put it: 'Parliament enacts legislation in the expectation that it will come into operation' (at 574).

⁸⁶ *Ibid* at 520 (per Bingham LJ).

⁸⁷ *Ibid*, at 573.

⁸⁸ I am indebted to the anonymous referee for pointing this out.

because it is such an important decision, Parliament will surely itself insist upon being given a role in making it.

THE FRUSTRATION ARGUMENT AND THREE REJOINDERS

The essence of the frustration argument is simple: that triggering Article 50 sets in train an irreversible sequence of events that will inevitably remove from UK citizens at least some enforceable legal rights granted to them under the 1972 Act and other legislation (e.g. the European Parliamentary Elections Act 2002). It would therefore violate the principle that the prerogative may not remove domestic law rights granted under statute. This is a formidable argument, with seemingly some authority.⁸⁹ The alternative way of putting the argument is that triggering Article 50 will inevitably lead to the ‘frustration’ of the core purposes of the 1972 ECA, which are said to be to ‘provide for the UK’s membership of the EU and for the EU Treaties to have effect in domestic law’ and indeed that starting the Article 50 process would ‘cut across the Act and render it nugatory....a dead letter.’⁹⁰

A number of objections to this argument have already been advanced by others, notably by two of the UK’s leading constitutional lawyers, Professors Paul Craig⁹¹ and Mark Elliott.⁹² These include in particular the argument that triggering Article 50 does not *itself* remove any rights granted under the ECA and that it is unknown at this point what rights if any will be removed (with the possibility still existing that none will be if the process is revoked). Paul Craig argues in particular that to hold that merely triggering a process leading to eventual withdrawal from a treaty would inevitably cut across the legislation implementing that treaty would be, not an application of *De Keyser’s*, but a ‘radical’ extension of it.⁹³ A further argument advanced by Elliott in particular notes that the ECA gives effect to such rights as ‘are from time to time’ laid down by the Treaties: in other words, the ECA does not guarantee any particular set of rights, but simply acts as a conduit for whatever rights are agreed by or under those Treaties entered into under the exercise of the foreign affairs prerogative at any given moment. Hence action taken under the

⁸⁹ See text to n 9 above.

⁹⁰ n 12 above.

⁹¹ PP Craig, ‘Brexit: a drama in six acts’, (2016) ELR, 447.

⁹² M. Elliott: <https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/>. See also the similar view of Carl Gardner: <http://www.headoflegal.com/2016/06/27/article-50-and-uk-constitutional-law>.

⁹³ n 91 at 463.

prerogative that is likely to vary the rights protected under the ECA cannot be said to be contrary to its central purposes.

This article does not seek to elaborate further on these arguments but instead to highlight the effect of the two arguments for judicial caution in this area explored above - interference between the democratic branches and the potential for harming the Government's ability to conduct foreign relations. It is suggested that the two arguments together provide a basis for suggesting that courts should resolve legal uncertainty in favour of non-intervention. This would suggest that, if the rejoinders to the frustration argument considered above and below create at least some reasons to doubt its applicability to the peculiar circumstances of this case, then that may be enough for a presumption against interference in this area to kick in.

The compatibility argument.

The first argument directly contests the notion that triggering Article 50 would cut across the purposes of the ECA. It derives in part from one aspect of Craig's argument that is both correct and crucial: that the 2008 Act, in giving statutory recognition to Article 50 within section 1(1) of the 1972 Act, must be taken to have affected any sensible judicial construction of the *purposes* of the 1972 Act, which must now be taken to include orderly exit from the EU.⁹⁴ Thus those purposes may now be seen as including keeping the UK in the ECA – and making EU rights available to UK citizens – 'unless the UK decides to leave'.⁹⁵ Craig makes this point only briefly and his argument may be fleshed out substantially by reference to the EU Referendum Act 2015, which authorised the holding of the June referendum. If the question being asked is whether the Executive, through use of the prerogative to trigger the process of leaving the EU, is flouting the purpose of statute, it must surely be relevant to consider the parliamentary intention evinced by a statute whose very purpose was to enable the British people to decide to leave the EU if they wished to. While, as many people have pointed out, the 2015 Act did not make the result legally binding, it was nevertheless passed in the clear understanding that the result of a Leave

⁹⁴ Craig at 000. Note that one can accept this argument while rejecting, as this article has done, the further contention that the 1972 Act makes specific procedures or restrictions in Article 50 *available and enforceable* in domestic law.

⁹⁵ Ibid at 000.

vote *would be* the UK's withdrawal from the EU. Therefore the 2015 Act must be taken to evince clear parliamentary contemplation of withdrawal from the EU under Article 50 in the event of such a vote.

Importantly, this view has received judicial support from the Court of Appeal in *Shindler*,⁹⁶ in which the court had to consider an (unsuccessful) EU-law challenge to the voting rules in the 2015 Act. Indeed Dyson MR went further in explicitly linking the 2015 Act to the Article 50 process for withdrawal. As noted above, the first stage in that process is that a state must 'decide to withdraw in accordance with its own constitutional requirements'. In this respect, Dyson MR made an important finding:

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.⁹⁷

His conclusion was that: 'the referendum (if it supports a withdrawal) is an *integral part of the process* of deciding to withdraw from the EU.' This striking finding suggests that, far from it being right to exclude consideration of the 2015 Act and referendum when assessing a decision to trigger Article 50, the judicial view is that that Parliament, in legislating for the referendum, actually intended it to be a constituent part of the 'decision' referred to in Article 50(1) to withdraw from the EU. In other words, Parliament not only passed legislation that expressly contemplated the UK leaving the EU: it provided for an event that, in the event of a Leave vote (which is what transpired), *would become part of the Article 50 process itself*. Thus Parliament, far from evincing an unwavering determination to keep the UK in the EU - and EU law rights available in domestic law - has on this view actually legislated so as to enable the first part of the Article 50 process to be satisfied, in the event of the Leave vote that duly materialised. In light of the above, it is suggested that the argument that use of the prerogative to trigger Article 50 would cut across the intention of Parliament as manifested in relevant legislation, seems hard to maintain.

⁹⁶ *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 419; this is also the only case in which Article 50 has received consideration by a UK court.

⁹⁷ *Ibid* at [19]

This line of argument may also provide a partial answer to one of the more specific and formidable arguments made by Barber et al. This is that even if the ECA guarantees no specific set of EU law rights (as Elliott argues), the European Parliamentary Elections Act 2002 does: it provides for the right to stand and vote in elections to the European Parliament. Furthermore this argument is said to be invulnerable to the argument applied to the package of rights guaranteed generally by the ECA - that because some rights (such as those connected to the Single Market) *may* be retained, depending on the withdrawal agreement the UK negotiation, it is impossible to say that merely triggering Article 50 will inevitably result in their loss. Instead, it is said that, whatever deal is reached, the rights to stand and vote in European Parliament elections will *certainly* be stripped away. One possible rejoinder to this argument points out that even this outcome is not certain, given the possibility of unilateral or agreed revocation of the Article 50 notification.⁹⁸ A perhaps stronger argument is that the 2002 Act could simply be re-interpreted, in light of the 2015 Act, as providing for the rights in relation to the European Parliament, *except* in the case of the UK deciding to leave the EU under Article 50.

A further argument still would point out that the notion that the Executive would be frustrating the purpose of these statutes, or stripping away the rights they vouchsafe, appears to be made on the assumption that Parliament will not, at the appropriate time, legislate so as to repeal or amend these statutes. Indeed the 'frustration' argument only really works if this assumption is made. For if the UK Government negotiates a withdrawal agreement that, when it comes into force, will involve the limitation or removal of some or even all of these rights (the latter being a perhaps unlikely outcome), and Parliament, before it comes into force, duly amends or repeals the relevant statutory provisions, then there would be no frustration of those provisions. But why should one make the assumption that Parliament will stubbornly seek to maintain in their current state statutes that no longer serve a useful purpose, or which now require amendment? Even if we grant that courts equally cannot assume that Parliament *will* repeal or amend them, then at most the courts are faced with the prospect that these statute *may eventually be* frustrated, depending on the currently unknown outcome of the negotiations *and* the future legislative action – or inaction – of Parliament. By contrast, cases like *Laker Airways* and *FBU* involved

⁹⁸ Above n 19.

government actions under the prerogative that, if not reversed, would *certainly* and *immediately* flout a statute and (in the case of *Laker*) wholly destroy the business of the applicant.⁹⁹ So while of course it is the role of courts to interpret and apply the law and not play guessing games, the point is that it is precisely the uncertainty in this scenario that helps distinguish this case, legally, from previous ones.

The argument from parliamentary omission.

A glance at the statute book reveals that, in the field of EU law, Parliament has long been astute to ensure that the Executive, acting unilaterally, does not alter domestic law as a result of reaching agreements with the other member states without specific parliamentary authorisation. Thus as far back as the late 1970s, section 6 of the European Parliamentary Elections Act 1978 provided that the Government could not ratify any treaty that increased the power of the European Parliament, *unless* that treaty had been ratified by Act of Parliament. This was reproduced in section 12 of the European Parliamentary Elections Act 2002. Subsequently, the very 2008 Act that gave statutory recognition to the Lisbon Treaty, and thus Article 50, sets out in section 6 a long list¹⁰⁰ of various specific EU-related actions that are not to be taken by Ministers without specific authorisation from Parliament: it does *not* include the triggering of Article 50 as one of them. The 2011 Act took this a stage further in setting out a number of matters, as before, that the UK Government could not do without parliamentary authorisation, but adding to it certain actions (essentially agreeing to extensions of the powers or competencies of the EU) that would additionally require the concurrence of the population in a referendum (the so-called 'referendum lock').¹⁰¹ Once again, none of these included triggering Article 50. Finally, we noted above, that the 2015 Act not only evinced a specific contemplation by Parliament that the UK would leave the EU in the event of a 'Leave' vote but, as the Court of Appeal found, actually made the referendum part of the constitutionally required arrangements for deciding to leave under Article 50(1). However, once again, the Act laid down no further role for Parliament in

⁹⁹ The effect of the disputed decision in *Laker Airways* (n 46 above) was to prevent the applicant from being able to land its planes in the US; this would have rendered impossible the operation of the applicant's entire business, which was to fly passengers from the UK to the US, as well as removing from it all the procedural protections it enjoyed under the relevant statutory and regulatory scheme.

¹⁰⁰ In s 6.

¹⁰¹ See ss 2, 3 and 6.

authorising a formal decision to leave the EU, or the notifying of that decision under Article 50(2). As Lloyd LJ observed in *ex parte Rees Mogg*:¹⁰² ‘When Parliament wishes to fetter the Crown's treaty-making power in relation to [EU] law, it does so in express terms.’ As just seen above, that argument has only been strengthened by statutes passed after that judgment was delivered. Thus in the absence of any provision in any of the EU-related statutes passed from 2008 on, requiring specific parliamentary authorisation for the triggering of Article 50, it may appear inapt to construe one as being impliedly intended.

The argument from democracy

Such implication may be seen as particularly troubling in light of the referendum. Proponents of the frustration argument do not seem to consider the point that the referendum result itself makes any difference to its application to this particular set of facts: indeed supporters of the legal challenge to the Government tend to stress only (and repeatedly) that the referendum result was not made legally binding but only ‘advisory.’ However, let us consider the normative core of the frustration argument as it applies generally. It is that the Executive should not be allowed to use the non-democratic prerogative, with its ‘clanking medieval chains’,¹⁰³ in order to bypass or frustrate the will of the elected Parliament. Lord Browne Wilkinson in the *FBU* case set out very clearly this democratic basis for the rule: ‘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.’¹⁰⁴ But to apply this to a situation in which the Executive is doing the very thing – starting the process of leaving the EU - that it was authorised by ‘the people’ to do by a referendum held on the issue, surely at the very least raises a question: should the frustration argument be applied where the Executive is using the prerogative to do no more and no less than carry out the will of a democratic majority, as expressed in a referendum? To ask this question is *not* to fall into the error of holding the referendum result to be in some way binding on Parliament: its binding force lies entirely in the political, not in the legal sphere. However, that does not mean that the referendum result should be entirely *ignored* by a court considering the application of the

¹⁰² *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, 567.

¹⁰³ A phrase used by Craig, at 000.

¹⁰⁴ n 14 above, at 552.

frustration principle to this novel set of facts: to do so would be to fail to heed the constitutional significance of that vote. Arguably what it does is supply, more directly and powerfully than any Act of Parliament, a democratic mandate to the Executive to start the formal process of withdrawal. As such it means, arguably, that the normative concern typically generated by the Executive's use of prerogative powers to frustrate a statutory purpose is absent in this particular case. Along with the other arguments considered above, that may well be enough to persuade a court not to hold it applicable on this novel set of facts. Indeed I argued above that if such arguments even create a substantial measure of doubt as to whether the frustration principle truly applies in this case, that in itself may be sufficient reason for a court not to apply it.

CONCLUSION

The essence of constitutionalism may be said to be the subjecting of potentially arbitrary power to effective means of accountability and control through both law and the democratic institutions of the state. The introduction to this article described the prerogative as 'one of the central problems of the UK constitution', precisely because it has traditionally largely escaped such accountability and control.¹⁰⁵ The last few decades have seen parliament and courts take a series of important steps towards addressing that problem, by bringing to bear new forms of control and much greater intensity of scrutiny – political and legal – upon governmental exercise of the prerogative powers. These have included not only the Fixed Term Parliament Act – a rare case of outright abolition of a prerogative - and the cases also considered in this article,¹⁰⁶ but also the 2010 reforms of placing the civil service on a statutory footing and giving Parliament a formal, legal role in relation to the ratification of treaties.¹⁰⁷ The new War Powers Convention, whereby

¹⁰⁵ Its still uncertain scope – and the related troubling issue of 'third source' powers are other aspects of the problem. For a fresh analysis of the latter see A. Perry, 'The Crown's administrative powers' (2015) 131(Oct) LQR 652.

¹⁰⁶ Though see n 67 above: often the advances have been extremely cautious.

¹⁰⁷ The last two achieved by respectively, Parts I and II of the Constitutional Reform and Governance Act, both of which have been criticised, especially the latter as overly cautious. The introduction of the Back Bench Business Committee as part of the Wright Committee Reforms has also been an extremely important step in giving the Commons some limited control over its own time, thus enhancing its general capacity to hold the government to account. The greater independence of the Select Committees – another product of the Wright reforms – is another important advance.

Parliament must approve proposed military action¹⁰⁸ is another important step. Thus the prerogative problem is gradually being addressed, step by step, sometimes almost accidentally,¹⁰⁹ and certainly quite unsystematically - just as one would expect in the UK constitution.

It would in many ways be tempting to hold up this situation as presenting a golden opportunity for another such step¹¹⁰-- and indeed it is, just not in the way that the proponents of the 'frustration argument' argue for it. The argument of this article is that the opportunity for the *courts* is to abjure any temptations of non-justiciability, and give a clear ruling on the legal issues,¹¹¹ thus shedding further light on some still-obscure aspects of the relationship between prerogative and statute; but that this is not the right case for the courts to *require* of the government that it seek parliamentary legislative permission in order to carry out its policy – in this case, triggering the Article 50 process. However, as made clear above, that does *not* mean that the author supports a high-handed governmental reliance on the prerogative that excludes parliament from the momentous decision the country now faces following the June referendum. Far from it. But if Parliament wants to insist upon being consulted before the Government 'pulls the Article 50 trigger' – or indeed wants to insist upon bringing that trigger under its own control, it has the means to do it¹¹² and this author, for one, would applaud either step. It may be noted that a Select Committee has already said clearly that it would be 'constitutionally inappropriate' for the Government to trigger Article 50 without 'explicit parliamentary approval'.¹¹³ This author thus rejects any notion that cases like *FBU* may present us with the 'stark choice' of embracing *either* parliamentary *or* judicial forms of controlling the Executive.¹¹⁴ On the contrary, the British constitution works most effectively when parliamentary and judicial

¹⁰⁸ n 73 above

¹⁰⁹ Arguably, the new War Powers convention came about more by chance than design: certainly Tony Blair allowed the key precedential parliamentary vote on the Iraq War (as it turned out to be) because of a particular combination of factors largely beyond his control, rather than any design or desire to give parliament a greater role in such decisions: see *ibid* and C. Murray and A. O'Donoghue, 'Towards Unilateralism? House of Commons Oversight of the Use of Force'. (2016)ICLQ 65(02) 305.

¹¹⁰ As noted above 91, Paul Craig, for one, considers that the application by the courts of the frustration argument in would involve a major extension of existing doctrine.

¹¹¹ Therefore not holding the whole issue non-justiciable.

¹¹² As discussed above, at 000.

¹¹³ n 72 above, at [24].

¹¹⁴ As Tomkins appears to present the matter, n 82 above at 30.

forms of control and accountability, rather than being framed as antagonistic alternatives, or mutually exclusive directions of travel, work *together*, but with clearly defined, differentiated and mutually complementary roles.¹¹⁵

¹¹⁵ For an argument by the author for such a 'complementary scrutiny' approach in a different context, see G. Phillipson, 'Deference and Dialogue in the Real-World Counter-Terrorism Context' in de Londras and Davis (eds) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge: CUP, 2014) 251 at 271-79.