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How Brexit Will Happen

A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit

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On 23 June 2016, the United Kingdom held a referendum (the “Referendum”) on its membership in the European Union (EU). The population was asked: “Should the United Kingdom remain a member of the European Union or leave the European Union?” The answer was an earthquake felt across Europe: 51.9 percent of the U.K. population opted for leaving the EU. For the EU, the outcome is one of the most significant setbacks in its history, comparable only to the rejection of the European Defence and European Political Communities in the 1950s.

For the U.K., the result is potentially much more devastating, as its four constituent countries favoured different approaches: while both England (53.4 percent) and Wales (52.5 percent) voted to leave the EU, Northern Ireland (55.8 percent) and Scotland (62 percent) opted to remain. The day after the Referendum, the First Minister of Scotland, Nicola Sturgeon, left little doubt about the possible fallout of the Referendum, calling it “democratically unacceptable” that Scotland might be taken out of the EU against its will, less than two years after a Scottish referendum on independence from the U.K., in which Westminster had argued that a Scottish vote for independence would end their membership in the EU. She stated that “all options … to secure our continuing place in the EU” were on the table, including a second referendum on Scottish independence. Northern Ireland faces equally troubling times: its land border with Ireland would become an EU border and the peace process might lose the strong EU support on which it has so long relied. Gibraltar, a British Overseas Territory, will be faced with similar border issues, despite 95.9 percent of its population voting to remain in the EU.

The number of legal questions raised by the U.K.’s decision to exit the EU (popularly called “Brexit”) are breathtaking. From fisheries to agriculture, from competition to

1 Shell Reader in International Dispute Resolution, King’s College London. The author would like to thank Sir Francis Jacobs, Professor Keith Ewing, Professor Maxi Scherer and Dr. Johannes Koepp for reading previous drafts of this article and their very helpful comments—of course, this does not imply that they embrace any of my views or are responsible for any of my errors.
intellectual property law, from civil procedure to trade, lawyers will spend years grappling with its consequences. Stunningly, none of them were considered or discussed to any great extent in the weeks and months before the Referendum. Accordingly, much work remains to be done. The scope of this article will be rather limited in this respect: it aims to explore the (scarce) prescriptions of EU law with respect to a Member State’s leaving the Union and some of its consequences, as well as the procedure to do so under U.K. constitutional law. It is deliberately intended to be a short introductory piece.

1. ARTICLE 50 OF THE TEU AND HOW TO REACH THE DECISION TO LEAVE THE EU UNDER CONSTITUTIONAL LAW

1.1 WITHDRAWING FROM THE UNION: ARTICLE 50 OF THE TEU AND THE NEED FOR A DOMESTIC DECISION

By introducing a provision on withdrawal from the EU, the Lisbon Treaty in 2009 resolved a long-standing debate whether a Member State could leave the Union. Article 50 of the Treaty on European Union (TEU) explicitly provides for this possibility.\(^4\) It is, as the U.K. government correctly stated prior to the Referendum, the only lawful way to withdraw from the EU. Some of the alternatives discussed in the U.K. public debate, such as repealing domestic legislation giving effect to EU law, would be in breach of the U.K.’s international obligations.\(^5\) Alas, as one perceptive commentator noted, Article 50 of the TEU was drafted not to be applied and accordingly is of little help with respect to the now very real prospect of a Member State leaving.\(^6\) As no country has ever left the EU before, there is also no experience with the provision.\(^7\)

According to Article 50(1) of the TEU “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.” A Member State

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\(^{4}\) The provision displaces rules under general international law allowing a state party to denounce or withdraw from a treaty (see Vienna Convention on the Law of Treaties, arts. 56, 60–62). DÜRR IN E. GRABITZ ET AL. (ED), DAS RECHT DER EUROPÄISCHEN UNION: EUV/AEU (58th ed. 2016), Art. 50 paras 1 ff., 11 ff.


\(^{6}\) Daniel Sarmiento, Un manual de instrucciones que se autodestruye en cinco segundos, El País 24 June 2016. In fact, former Prime Minister of Italy Giuliano Amato, who says he wrote art. 50, admitted that it was not written to be used. Christopher Hooten & Jon Stone, Brexit: Article 50 Was Never Actually Meant to be Used, Says its Author, INDEPENDENT 27 July 2016.

\(^{7}\) The only relevant experience consists of parts of countries leaving the Communities. Greenland, an autonomous country within Denmark, has not been a territory of the Communities since 1985 and is instead an overseas country and territory. It has been suggested to use the example of Greenland and let England and Wales leave the Union with Scotland, Northern Ireland and Gibraltar remaining. D. Sarmiento, Brexit or the Art of “Doing a Greenland”, https://despeourdifferencesblog.wordpress.com/2016/07/12/brexit-or-the-art-of-doing-a-greenland/.
which takes this decision must “notify the European Council of its intention” under Article 50(2) of the TEU. The decision to leave the Union is thus a sovereign decision of the Member State. How and why a state reaches the decision is not a matter of Union law, but is left to national constitutional law. Union law does not impose any particular requirements in that regard. The fact that Article 50(1) of the TEU explicitly refers to national constitutional requirements was not supposed to elevate those requirements to the level of Union law, or even grant the Court of Justice of the European Union (CJEU) the power to verify compliance with them. The Union generally has no competence to verify compliance with national laws.⁸

As a consequence, if the U.K. were to “notify the European Council of its intention” through the normal channels, although the constitutional requirements for reaching a decision are not fulfilled, this would nevertheless start the withdrawal process.

Even though it is not enforceable in the CJEU, Article 50(1) of the TEU’s reference to the constitutional requirements does serve as a stark reminder that a decision to leave the EU needs to be reached in a way that respects the national constitution. Such a decision cannot be taken lightly given what is at stake: EU law has become an integral part of the constitutional set-up of Member States. The principles of supremacy and direct effect of EU law, established in the 1960s,⁹ have changed Member States’ legal systems fundamentally and EU law has touched areas of law as diverse as international civil procedure¹⁰ and waste management.¹¹ For most EU Member States, a decision to leave the Union would constitute an amendment of the constitution and require the necessary majority.

What, then, are the requirements established by the U.K. constitution to take this decision? There are, in principle, two schools of thought on this question: some argue that the decision can be taken by the U.K. government alone. Others insist that the U.K. government cannot decide to leave the EU without prior authorization by Parliament. To answer the question, this article will first explain the concept of parliamentary sovereignty. It will then discuss the legal import of the referendum. Finally, it will explore whether the U.K. government can act without Parliament in this matter and whether the devolved Scottish legislature needs to participate in the decision.

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1.2 Sovereignty of Parliament

The United Kingdom is one of the few countries in the world that does not have a written constitution. Instead, constitutional law consists, as Dicey explained, of two sets of (written and unwritten) rules affecting the distribution and exercise of the sovereign power of the state: first, laws that can be enforced by courts and, secondly, conventions which regulate the conduct of institutions but will not be upheld by courts. Of the former, the first and foremost rule is that of the sovereignty of Parliament. Sovereignty, in the U.K. constitution, resides with the “Queen in Parliament,” understood as the trinity of Queen, House of Commons and House of Lords, together enacting an Act of Parliament. Parliament obtained this central position in U.K. constitutional law in long struggles with the Crown, which before the late seventeenth Century possessed prerogative powers that Parliament could not take away.

Under the modern doctrine, however, the Queen in Parliament has, in the words of Dicey:

the right to make or unmake any law whatever; and, further … no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament … The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described; any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated; there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.

While the twentieth century might have brought some modifications to the doctrine when it comes to devolution (which we will have to discuss later on), human rights law or, ironically, EU law, the doctrine essentially continues to be valid to this day. In particular,

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13 Some authors prefer the term supremacy over the complicated concept of sovereignty. See A.W. BRADLEY ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW (16TH ED. 2015), 49.
14 Ibid. 46 ff.
16 Ibid. 51 ff.
while the Crown (including the government as personified by the monarch) has certain powers needed to perform its function (the so-called “royal prerogative”) it appears to be clear that there are no powers of the Crown that could not be removed or controlled by an Act of Parliament.\(^{17}\)

Accordingly, it is undisputed that one way the decision to leave the EU could be legally taken would be by Act of Parliament. However, Parliament has not taken such a decision, and it is far from clear that its members would take such a decision. Parliament has, however, in an Act of Parliament provided for the Referendum to be held.\(^ {18}\) The status of that Referendum will be explored next.

### 1.3 Legal Status of the Referendum

Referenda are not traditionally part of the U.K. legal system. Nevertheless, they have been used increasingly since the 1970s: thus the U.K. electorate was called to vote on continued membership in the European Communities in 1975 and, for example, on constitutional matters in Northern Ireland and devolution or even independence in Scotland and Wales.\(^ {19}\) In fact, referenda have become sufficiently common for Parliament to have provided a framework regulating national and regional referenda taking place pursuant to an Act of Parliament in the Political Parties, Elections and Referendums Act 2000.\(^{20}\) The Referendum on EU Membership is one such referendum, provided for in the European Union Referendum Act 2015.\(^ {21}\)

It should be noted that neither the Referendum Act nor the 2000 Act state what the consequences of the Referendum are or make the outcome binding on Parliament or the government. This is in stark contrast to the referendum on the alternative vote system held in May 2011. The Act providing for that referendum stated in some detail what acts had to be taken to implement its result.\(^ {22}\) In light of the absence of a similar provision, there is a broad

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17 Ibid. 250, 252.
18 European Union Referendum Act 2015 c. 36.
20 c. 41.
21 In fact, the Explanatory Notes to the European Union Referendum Act 2015 in para. 4 explicitly state that the 2000 Act applies. The Referendum was unsuccessfully challenged because U.K. citizens who had been living outside of the U.K. for more than 15 years were excluded from voting. R (on the application of Shindler and another) v. Chancellor of the Duchy of Lancaster and another, U.K.SC 2016/0105. Curiously, Lady Hale considered it “not arguable” that this constitutes an interference with the right of free movement under EU law.
22 Parliamentary Voting System and Constituencies Act 2011 c. 1, s. 8.
consensus that the Referendum on EU membership is not legally binding but merely advisory, whatever political pressures might dictate.\(^{23}\)

Even though almost all authors seem ready to admit the lack of any binding legal effect of the Referendum, some do so with some uneasiness. Kenneth Armstrong thus argues that recourse to the Referendum should mean that on this issue direct democracy now trumps representative democracy and further action by Parliament is no longer needed.\(^{24}\) Similarly, Aris Georgopoulos states that involvement of Parliament could no longer be meaningful as Parliament could only symbolically endorse the Referendum result. Any governmental action would already be legitimized by the demos itself.\(^{25}\)

These arguments, which in fact establish legal consequences of the Referendum, are not convincing. First, the U.K. system is not one of direct but of representative democracy. A referendum, under U.K. constitutional law, is not inherently democratically superior to a decision by Parliament. Secondly, holding a referendum does not imply that parliamentary action would be reduced to being symbolic. If we are to take the non-binding advisory role of a referendum seriously, Parliament (if indeed parliamentary action is necessary, which we will examine in the next section) can choose to follow or disregard the advice. Parliament can also choose to make following the advice mandatory before a referendum is held, as it did with respect to the referendum on the alternative vote system. But here, Parliament has chosen not to do so. It would be wrong to assume that a referendum automatically reduces a parliamentary decision on the issue to mere symbolism. Parliament itself does not seem to think so. In section 2(1)(b) and (c) of the European Union Act 2011, enacted to raise the hurdle of any amendment to the EU treaties transferring more power or competences from the U.K. to the EU, Parliament explicitly provided that a treaty amending or replacing the European Treaties is not to be ratified unless “the treaty is approved by Act of Parliament, and the referendum condition … is met.”\(^{26}\) In some contexts, Parliament thus regards it as desirable to combine both a direct and a representative democratic justification of a particular decision. By failing to provide for any binding consequences of the EU Referendum, Parliament did not change the constitutional requirements; the Referendum accordingly has no legal effect at all. The European Parliament was thus clearly mistaken when it stated in a resolution passed after the Referendum that the notification of the outcome of the Referendum

\(^{23}\) See, e.g., the following contributions that are all available via https://ukconstitutionallaw.org/tag/article-50-teu/: K. Armstrong, *Push Me, Pull You: Whose Hand on the Article 50 Trigger?*; R. Williams, *Do We Have to Follow the Result of the Brexit Referendum?*.

\(^{24}\) Armstrong, supra n. 23.


\(^{26}\) Emphasis added.
to the European Council “will launch the withdrawal procedure”: the Referendum itself was not yet a valid national decision to leave the EU.

Despite the clear legal position that the Referendum is not legally binding, it should be mentioned that the political position is quite different. Politically, it will be difficult for Parliament to not follow the advice of the majority in the Referendum, as the Conservative Party Manifesto made it rather clear that the Referendum result would be respected.

1.4 POWER OF THE GOVERNMENT TO DECIDE ON BREXIT WITHOUT PARLIAMENTARY ASSENT

Despite the principle of sovereignty of Parliament, and even though the Referendum itself has no binding legal effect, David Cameron stated that the decision to trigger Article 50 of the TEU would be taken by the Prime Minister. Two legal grounds have been put forward on which this power could be based: a number of commentators regard a decision to trigger Article 50 of the TEU as an exercise of the prerogative power by the government. One scholar has argued instead that the government could take the decision by passing an Order in Council under the European Communities Act 1972.

The latter argument is based on section 2(2) of the European Communities Act 1972 which provides that:

Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision (a) for the purposes of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised.

According to this line of thinking, a withdrawal decision under Article 50 of the TEU is the exercise of a right enjoyed by the U.K., and the European Communities Act 1972 explicitly provides how this right is to be exercised. Article 50 of the TEU itself became part of U.K.

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27 European Parliament Resolution of 28 June 2016 on the decision to leave the EU resulting from the U.K. Referendum (2016/2800(RSP)).
31 C. 68, as amended.
law by way of the European Union (Amendment) Act 2008, adding the Lisbon Treaty to the list of Community Treaties of the 1972 Act. Under the rationale of Attorney-General Appellant v. De Keyser’s Royal Hotel, where a statute explicitly provides a procedure for how the government has to exercise a certain power, this statutory procedure precludes the use of prerogative powers, and accordingly, the only way the government could trigger Article 50 of the TEU would be by using the procedure in the European Communities Act 1972.\textsuperscript{32} Ultimately, however, this argument is likely to fail. As Mark Elliott points out, section 2(2)(a) of the European Communities Act 1972 was intended to enable the U.K. to make secondary legislation to enable rights under the Treaties to be exercised, i.e., to implement the treaties, as the heading of section 2 implies. The power to make a decision under Article 50 of the TEU, however, does not require implementation. Accordingly, the procedure provided for in the European Communities Act 1972 is not applicable to triggering Article 50 of the TEU.

The more pertinent power that a decision by the Prime Minister to trigger Article 50 of the TEU could be based on is the royal prerogative.\textsuperscript{33} Historically, the prerogative powers exercised by the monarch were rather vast and included the right to legislate by proclamation.\textsuperscript{34} However, in the seventeenth century, it was established that they were subject to the law, and over time they were further limited. Indeed, the history of the U.K. constitution is partly the story of the continuing limitation of the prerogative powers.\textsuperscript{35} Today, these powers, which enable the government to function, are granted under the common law and, more often than not, exercised by or on behalf of the government of the day.\textsuperscript{36} The pertinent prerogative power at issue here is the one relating to foreign affairs.\textsuperscript{37}

\textsuperscript{32} [1920] A.C. 508, 539 ff. (Lord Atkinson).
\textsuperscript{33} It has been argued that art. 50(1) of the TEU could be regarded as a confirmation of that power introduced into U.K. law through the European Union (Amendment) Act 2008 c.7. However, this argument is circular as it assumes that the proper constitutional process to invoke art. 50 of the TEU is part of the prerogative powers rather than proving it.
\textsuperscript{34} H. Barnett, Constitutional & Administrative Law (11th Ed. 2016), 95.
\textsuperscript{36} A.W. Bradley et al., Constitutional and Administrative Law (16th Ed. 2015), 252 ff.
parliamentary approval, even though, as the U.K. is a dualist system with regard to international treaty law, Parliament has to incorporate the treaty for it to be enforced in domestic courts. The argument that the prerogative power applies is supported by the fact that the U.K. acceded to the European Communities through use of the royal prerogative: it is true that Parliament had to act to bring the U.K. into compliance with European law, but the act of accession itself was based on the royal prerogative and did not require parliamentary approval.

Whether the royal prerogative can actually be used as a basis for reaching a decision to trigger Article 50 of the TEU is far from certain, however, and currently the subject of a challenge in court. Extending prerogative powers to this issue can be attacked on two grounds.

First, it is questionable whether the decision to withdraw from the EU is merely a decision pertaining to foreign affairs. The EU is not an international but a supranational organization: it exercises sovereign national powers delegated to it in areas that require regional cooperation. Its legislation and treaties demand, and are granted, supremacy over national law in the Member States and are (where the applicable conditions are fulfilled) given direct effect. Participation in the EU is, accordingly, not just a matter of foreign affairs but a decision concerning the constitution of a state. This can be seen clearly in several Member States with written constitutions, where the constitutions have had to permit the delegation of powers to the EU. Many of the written constitutions of EU Member States now distinguish regular matters of foreign affairs, on the one hand, and matters concerning the EU, on the other. The same is also true for the U.K., in which the discussion whether and to what extent EU law has modified the sovereignty of Parliament has been a perennial favourite in constitutional law classes (and not in discussions on foreign affairs). Lord Justice Laws expressed the thought that EU membership is part of U.K. constitutional law concisely when he introduced a distinction between “ordinary” and “constitutional” statutes in Thoburn

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38 On the interaction of public international and domestic law see Pierre-Marie Dupuy, International Law and Domestic (Municipal) Law, in: RUDIGER WOLFRUM (ED.), MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW.

39 Nowadays, in some cases the House of Commons possesses a veto over the government’s treaty-making powers. A.W. BRADLEY ET AL., CONSTITUTIONAL AND ADMINISTRATIVE LAW (16TH ED. 2015), 255 f.

40 I thank Keith Ewing for clarifying this issue.

41 These basic concepts of EU law have not developed after the accession of the U.K. to the Communities, they were already part of European Communities’ law when the U.K. joined the Communities in 1973. The decisions establishing these doctrines were handed down in the 1960s. See supra n. 9.

42 See, e.g., German Grundgesetz, art. 24(1) and Spanish Constitution, art. 93. In that regard see Maria Isabel Gonzalez Pascual, Salzburg Report Spain (forthcoming).

43 See German Grundgesetz, art. 23, as opposed to arts. 24, 59; French Constitution, arts. 88–1–88–7 as opposed to arts. 52–55; see the distinction between foreign affairs and relations between Italy and the EU in Italian Constitution, art. 117.
v. Sunderland City Council, and stated that the 1972 Act “clearly” belongs in the constitutional category: “It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The [1972 Act] is, by force of the common law, a constitutional statute.” 44 The organization of government also reflects the distinction between foreign affairs and European Union matters: EU matters have never been the exclusive realm of the Europe Directorate at the Foreign and Commonwealth Office. Working in and with the EU has rather been part of the daily affairs of almost every U.K. government department. To permit the Prime Minister to trigger Article 50 of the TEU under the prerogative power would extend that power from foreign affairs to what is, in fact, more aptly described as a constitutional revolution. Such a broad use of the prerogative power was regarded as inappropriate even before the days of the Glorious Revolution. 45

Secondly, even if one were to consider the decision under Article 50 of the TEU as falling under the prerogative powers in foreign affairs, there are limits to those powers that this decision would violate. The basic principle was stated by Sir Edward Coke at the beginning of the seventeenth century, after the monarch had made ample use of an alleged power to legislate by proclamation. In the so-called Case of Proclamations, Sir Edward Coke wrote: “the King by his proclamation … cannot change any part of the common law, or statute law, or the customs of the realm.” 46 The supremacy of the law over royal privilege has been confirmed and reconfirmed numerous times in English courts. In recent times, for example, Lord Oliver of Aylmerton described the prerogative power concerning treaty-making and the lack of domestic effect of treaties (i.e., their non self-executing character) in J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry in the following words:

as a matter of the constitutional law of the United Kingdom, 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. 47

In the same vein, Lord Browne-Wilkinson wrote in R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union and others:

45 The Glorious Revolution (1688–89) resulted in the deposition of James II and the accession of Mary II and William III to the Crown; it also limited the power of the monarch through the Bill of Rights 1688 ch. 2 1 Will and Mar Sess 2. See Encyclopedia Britannica, Glorious Revolution (last updated 2016).
46 (1611) 12 Co. Rep. 74, 75.
My Lords, it 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 even though the old scheme has been abandoned … It is for Parliament, not the executive, to repeal legislation.  

The rule is clear: the exercise of prerogative powers cannot frustrate a statute. Its exercise may not alter or repeal a statute, and it may not alter or repeal rights granted by a statute.

Nick Barber, Tom Hickman and Jeff King have argued that triggering Article 50 of the TEU would, however, do precisely that and hence could not be based on the royal prerogative. Triggering Article 50 of the TEU implies, according to the provision itself, that after two years, or even sooner upon the entry into force of a withdrawal agreement, the EU Treaties cease to have effect for the U.K.. This would, according to Barber, Hickman and King, render nugatory the European Communities Act 1972, which ensures that the EU Treaties have effect in domestic law, and the European Parliamentary Elections Act 2002, which provides U.K. citizens with voting rights for the European Parliament. They argue that, accordingly, the Prime Minister cannot rely on the prerogative power to trigger Article 50 of the TEU and would need Parliament to pass an Act empowering her to do so.

Mark Elliott disagrees: he states that giving notice under Article 50 of the TEU would not automatically render the 1972 Act a dead letter. On the one hand, a withdrawal agreement might lead to EU membership on altered terms, or EEA membership, meaning that some EU law could still be implemented by way of the 1972 Act. On the other hand, the 1972 Act, according to Elliott, does not grant particular rights but was passed to enable the U.K. to comply with its EU law obligations. If these EU law obligations cease, the 1972 Act might cease to be relevant, but it would still fulfil the goals pursued by Parliament, namely bringing

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49 Note that it might be possible to read the case law more narrowly as implying that a statute prescribing how government needs to act cannot be circumvented by recourse to prerogative powers. In light of the quoted statements and the rationale of the case law going back to Sir Edward Coke, a narrow reading misunderstands the essential function of Parliament in U.K. constitutional law. See also M. Elliott, On Why, as a Matter of Law, Triggering Article 50 Does not Require Parliament to Legislate, available at https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/.
50 C. 24.
the U.K. into compliance with its international obligations. Elliott would apply a similar analysis to the European Parliamentary Elections Act 2002. The result is, according to him, that just as the government could make the U.K. join the Communities relying on the prerogative powers, it can also make the U.K. leave relying on these powers.\(^\text{52}\)

A detailed analysis shows, however, that it is more convincing to assume, as Barber, Hickman and King have done, that the decision to trigger Article 50 of the TEU does have an impact on U.K. statutory law. In this regard, as a preliminary matter, Elliot’s argument as to the possibility of the EU Treaties continuing in force to some extent under a withdrawal agreement must be dismissed. The withdrawal process described in Article 50 of the TEU by default results in the Treaties ceasing to be in effect for the U.K.. It is true that a different agreement might be reached, but it is not even clear the U.K. government would want such an agreement. Law cannot be argued on the basis of wishful thinking and speculation. Instead, absent provisions to the contrary, two years after the Article 50 mechanism is triggered, the Treaties will cease to be in effect for the U.K..

What precisely will happen to EU law after the Treaties cease to be in effect for the U.K. is, however, a complex question given the scope of EU law, the different legal acts of that EU legal system (e.g., Treaties, Directives, Regulations) and the way they have been implemented in the U.K.. A theorist of public international law might allege that nothing much changes because, in theory, the U.K. is a dualist system. International law cannot be invoked in court, it must be transposed into domestic law to take effect, and everything that has been transposed then becomes part of national law and will continue to be in force, whether or not the underlying international obligation still exists. This, however, fails to grasp the reality of the EU legal system. EU membership has provided U.K. citizens and residents with numerous rights. EU law allows them to make use of the fundamental freedoms of the Union; it binds national legislatures applying EU law to the Charter of Fundamental Rights; it allows individuals to vote for the European Parliament; it forces national apex courts to submit certain cases raising questions of EU law to the CJEU; in some circumstances individuals are granted access to that Court; it allows individuals to (generally) enforce judgments of other courts in the EU in the U.K., and so on.

Some of these rights can be granted, and will continue to be granted, by the U.K. independently of EU membership. Thus, a U.K. Act transposing a Directive and imposing obligations on the U.K. government will continue to be in force even after the Treaties cease

to be in effect. Triggering Article 50 of the TEU will not affect it, and accordingly, Brexit will likely not have an impact on these Acts of Parliaments.

Other rights are granted by EU acts that are directly applicable in the U.K., such as EU Regulations. These acts have not been transposed into U.K. law but instead apply via section 2(1) of the European Communities Act 1972, which provides “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 … without further enactment” with legal effect in the U.K..

Arguably, these regulations will lose their effect in the U.K. once the Treaties cease to be in effect. If one follows Elliott’s argument, that loss would not constitute any change to the European Communities Act 1972 but instead would be part of a statutory scheme aimed at merely implementing EU obligations that the U.K. actually has. The problem with Elliott’s argument is that, even though it is true for each individual act of EU law, when it comes to the whole body of EU law implemented by the European Communities Act 1972, it is problematic. The goal of the act was not just to fulfil international obligations; it was also to provide for membership in the Communities. That goal is clearly undermined. The European Communities Act 1972 is not the only Act that would suffer this fate of, if you want, indirect nullification. Section 60(2) of the Competition Act 1998, for example, forces courts to apply principles laid down by the Treaty and the European Court and relevant decisions of that Court as applicable at that time in determining questions arising under Community law. No such questions would arise in the future. One might now consider the consequences of Brexit on this Act—EU law would cease to be relevant—as a precise implementation of the wish of the legislature. However, given the breadth of the impact of EU law on U.K. law that seems to be doubtful at best.

The undermining effect that the exercise of prerogative powers would have on Acts of Parliament with respect to Article 50 of the TEU is, however, even clearer with respect to yet a third category of rights. These are rights that have led to implementing Acts of Parliament but that cannot be granted by the U.K. alone because they require cooperation of the EU or its Member States that can only be obtained through the continuing legal force of the Treaties. The European Parliamentary Elections Act 2002 is a good example in that regard. The Act organizes elections for the European Parliament in the U.K.. The U.K. can certainly continue to hold such elections after Brexit, but MEPs from the U.K. will not be admitted to the European Parliament. Elliott’s argument that all of these Acts, too, were intended to implement an international obligation and continue to fulfil that purpose even after Brexit
clashes with the wording of the very Acts. The 2002 Act, for example, intends to organize elections to the European Parliament and not just to fulfil the U.K.’s obligation.\(^{53}\)

A good argument can, accordingly be made that the Prime Minister can only trigger Article 50 of the TEU after authorization by Parliament. The legal questions surrounding the issue are now subject to litigation. According to news reports, seven private actions have been filed, or threatened, to ensure that the government will not trigger Article 50 of the TEU without authorization by Parliament.\(^{54}\) The English High Court has held a directions hearing at which it was decided that the Lord Chief Justice, Lord Thomas of Cwmgiedd, will hear the joined cases in October, the lead case being brought by an investment manager, Gina Miller, and another challenge initiated by Deir Dos Santos, a British hairdresser. The latter claim, the only one filed at the time of the directions hearing, argued that both the principle of parliamentary sovereignty and the limits of prerogative powers demand that Parliament assent to a decision to trigger Article 50 of the TEU. The government stated at the hearing that it would not trigger Article 50 of the TEU in 2016, and the court decided to plan the case in such a way that a leapfrog appeal to the U.K. Supreme Court could be argued before the government notifies the U.K. decision to leave the EU to the European Council.\(^{55}\) A similar challenge has been filed in court in Northern Ireland, adding the threat Brexit poses to the Good Friday Agreement to the arguments raised.\(^{56}\) Political pressure on the courts will be immense, as parts of the public conceptualise the case as an undemocratic challenge to the Brexit Referendum.\(^{57}\) Therefore, the challenges face an uphill battle. However, the outcome is not a foregone conclusion, as can be seen from a statement of Lord Dyson MR in *Shindler v. Chancellor of the Duchy of Lancaster* in which he seems to assume without any argument that it is Parliament that takes the decision to withdraw from the EU.\(^{58}\)

### 1.5 Brexit and Devolution

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\(^{53}\) One could attempt to argue that any undermining effect that withdrawal from the EU has on Acts of Parliament has to be dismissed because the Treaty of Lisbon explicitly provided for withdrawal from the EU. However, where the exercise of a right under a treaty clashes with statutory law, the prerogative power cannot be exercised. See *Laker Airways v. Department of Trade* [1977] Q.B. 643, 707 (Lord Denning, MR).

\(^{54}\) Owen Bowcott, *Theresa May Does not Intend to Trigger Article 50 this Year, Court Told*, The Guardian 19 July 2016.

\(^{55}\) Ibid.

\(^{56}\) Alan Erwin, *Victims’ Campaigner Raymond McCord takes the U.K. to Court over Brexit*, Belfast Telegraph 12 August 2016.

\(^{57}\) See the Daily Mail report on the lawsuit: Steph Cockroft, *High Court judges WILL rule on whether MPs can overturn Brexit vote while some campaigners end fight and blame ‘threatening’ racist and anti-semitic abuse*, Mailonline 19 July 2016.

\(^{58}\) [2016] EWCA Civ 469, para. 19.
One final question relating to U.K. constitutional law is raised by the fact that the U.K. has instituted a devolved system of government under which the central Parliament of the U.K. has granted powers to regional parliaments, in particular the Scottish Parliament. This raises the question whether Scotland could block the U.K. government and Parliament from deciding that the U.K. leaves the EU. The question is all the more pertinent, as Scotland voted to remain in the EU, and the First Minister of Scotland has made it clear that Scotland will not stand idly by as the U.K. effectively takes it out of the EU.

The argument in favor of requiring consent by the Scottish Parliament proceeds as follows: devolution to the Scottish Parliament was effected by way of a constitutional convention, the so-called Sewel Convention, that established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Devolved matters include questions affecting the breadth of the devolved institution’s powers.⁵⁹ As EU law limits the powers of the Scottish Parliament, Brexit will have an effect on those limits and accordingly trigger the Sewel Convention.⁶⁰

However, the Sewel Convention could not prevent Westminster from deciding to trigger Article 50 of the TEU. It is merely a constitutional convention— a non-binding usage. Disregarding it might entail an enormous political cost, but it is legally possible. The Scotland Act 2016 has not changed the status of the Sewel Convention.⁶¹

2. WHAT HAPPENS AFTER A DECISION IS REACHED: ARTICLE 50 OF THE TEU, DIVORCE NEGOTIATIONS AND FUTURE TRADE DEALS

2.1 START OF THE NEGOTIATIONS

Once the decision to withdraw from the Union has been reached and notified to the European Council, Article 50(2) of the TEU provides that “the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.”

Formal negotiations on Brexit, accordingly, commence once notice has been given by the U.K. that it will leave the Union. Whether informal discussions can take place before notice is given has been the subject of some dispute. There is nothing in the provision banning such negotiations. The U.K. would favour them, as notice under Article 50(2) of the TEU sets

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⁶⁰ Note that the Sewel Convention demands legislation by Westminster. Accordingly, an exercise of the prerogative powers would, as Mark Elliot argues, not trigger the Sewel Convention.
⁶¹ See in detail on this question Mark Elliott, *Can Scotland block Brexit?*, available at https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/.
in motion a two-year period after which, if it is not prolonged, the Treaties will cease to apply even if no agreement has been reached. The short timeframe will put a significant amount of pressure on negotiators. The Commission and leading Member States’ politicians, however, have refused to engage in informal negotiations before notice under Article 50(2) of the TEU has been given.\(^62\) There is a legal reason for this refusal: as has been discussed, the Referendum held in the U.K. has no legal effect. The U.K. has not, according to its constitutional requirements, decided to leave the EU. Discussing withdrawal arrangements is thus, legally speaking, premature and would interfere with internal U.K. decision-making.

### 2.2 Content of the Negotiations

A careful reading of Article 50(2) of the TEU shows that the EU and the U.K. will have to discuss two separate, but related items: namely, the arrangements for the U.K.’s withdrawal and the framework for its future relationship with the EU.\(^63\) The first heading will contain numerous technical issues concerning the “divorce” between the EU and the U.K.: what will happen to unfinished structural funds, budget contributions, pending cases before the CJEU, rights of U.K. nationals abroad, social security, the EU agencies that will have to leave the U.K., and so on.\(^64\) After decades of EU membership and given the scope of programs and EU law, the issues raised are of fantastic complexity. The second agreement, concerning the future relationship, is often referred to as the “trade” agreement. Here, the U.K. will have to choose whether it will want to belong to EFTA, whether it prefers bilateral agreements like Switzerland, or whether it envisages a different deal. Unfortunately, advocates of Brexit both disagree on the goals the U.K. should pursue in this regard and insist that any deal should give them full access to the Single Market without free movement or submission to EU law. As the Single Market is created by EU law and is, at its very core, defined by the “four freedoms” including free movement, that goal is entirely unrealistic. A possible compromise could consist of access to the Single Market, compliance with EU law and a side agreement on free movement that puts existing limits to free movement and access to social benefits into treaty language. The existing limits on the right to move and reside freely within the EU are currently contained, for example, in Directive 2004/38.\(^65\) The CJEU has also made it clear

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\(^{62}\) J. Henley et al., *European leaders rule out informal Brexit talks before article 50 is triggered*, Guardian, 27 June 2016.


\(^{64}\) Peter Oliver, *What will the Withdrawal Agreement under Article 50(2) contain?*, available at www.monckton.com/will-withdrawal-agreement-article-502-contain/.

that the EU allows limits to access to social benefits for citizens from other Member States.\footnote{Case C-333/13 Dano; Case C-299/14 García-Nieto, ECLI:EU:C:2016:114.} However, trade relations are not the only issue concerning the future relationship between the EU and the U.K.. Before the House of Lords, Sir David Edward listed issues ranging from EU research funding to Erasmus to access to children and cross-border family maintenance payments after divorce of a mixed U.K. and Member State couple and concluded that the “long-term ghastliness of the legal complications is almost unimaginable.”\footnote{House of Lords, The Process of Withdrawing from the European Union (2016), 13.}

Some questions have been raised as to the sequencing of the two deals. Commissioner Cecilia Malmström stated in an interview with the BBC that the withdrawal agreement should be negotiated first and that a trade agreement could only be negotiated after the U.K. has left the Union. EU and U.K. trade relations would, in the meantime, be governed by WTO law alone. As Peter Oliver has rightly pointed out, this position is not easy to square with the wording of Article 50(2) of the TEU. That provision requires that the withdrawal agreement takes account of the framework for the future relationship between the EU and the U.K..\footnote{The German language version, alleged by Sir David Edward to go somewhat further, is basically identical with the English version as it states that “der Rahmen für die künftigen Beziehungen dieses Staates zur Union berücksichtigt wird.” House of Lords, The Process of Withdrawing from the European Union (2016), 10.} This indeed also fulfils a practical necessity, as it is difficult to imagine how a withdrawal agreement could be negotiated without at least a basic clarification of the future relationship between the EU and the U.K.. Thus, while the “trade agreement” can be concluded after the withdrawal agreement, at least the basic lines of the trade agreement need to be clarified simultaneously with the withdrawal agreement. Different rules, however, apply to the negotiation of trade agreements with third states, as will be discussed later.

2.3 Conduction of the negotiations

Article 50(2) of the TEU contains further details as to how the negotiations are to be conducted on the side of the EU, partly referring to Article 218(3) of the TFEU. After the U.K. notification, the European Council will, by unanimity,\footnote{TEU, art. 15(3); House of Lords, The Process of Withdrawing from the European Union (2016), 7.} set down guidelines for the negotiations. The Commission will submit recommendations to the Council of the EU, which then adopts a decision authorizing the opening of negotiations and nominating the Union negotiator or the head of the Union’s negotiating team. On behalf of the Union, the agreement will be concluded by the Council of the EU acting by a qualified majority\footnote{As modified by TEU, art. 50(4).} after obtaining the consent of the European Parliament. If the agreement also touches Member States’ competences, they too will have to ratify the agreement, which is then called a “mixed”
agreement. The U.K. as the withdrawing Member State will not participate in the relevant discussions or decisions of the European Council or the Council of the EU for these purposes.72

Who exactly will lead the negotiations on behalf of the Union is currently unclear. Both the Council of the EU and the Commission demand to take the lead in the negotiations. In normal treaty negotiations with third states, the Commission is in charge of the negotiations.73 The Council of the EU reportedly argues that the negotiations with the U.K. should be treated differently because the U.K. is not a third state, whereas the Commission’s legal service states that for the purposes of the negotiations under Article 50 of the TEU the withdrawing Member State is already treated as a third state. It is against that background that one has to look at the quick appointment of the Belgian diplomat Didier Seeuws to lead the negotiations as the head of a special Council task force, as well as the appointment of the political heavyweight Michel Barnier to head the negotiations and Commission task force. For the U.K., it might well make a difference which institution takes the lead in the negotiations: the Council of the EU, as the institution representing Member States in the Union, is traditionally a friendlier forum for states, whereas the Commission’s task is to preserve the Treaties and the Union. However, only the Commission possesses the technical knowledge required for the complex negotiations with the U.K., and its active involvement is a necessity even if the Council of the EU will take the lead.74

2.4 LENGTH OF THE NEGOTIATIONS AND CONSEQUENCES IF NO DEAL IS REACHED

According to Article 50(3) of the TEU, the Treaties will cease to apply to the withdrawing state either from the date of entry into force of the withdrawal agreement or, if no agreement is reached, two years after the notification. The two-year time period provided for by the provision to negotiate the withdrawal agreement can be extended by the European Council, deciding unanimously, and in agreement with the U.K.. The treaty does not impose any

limitations on such extensions. If the negotiations proceed harmoniously, it is likely that an extension will be granted.

If, however, an extension is not granted and the EU and U.K. did not come to a withdrawal agreement during the two-year period, Article 50(3) of the TEU provides that the Treaties shall cease to apply to the U.K. The dire consequences of such a disorderly withdrawal are easiest to describe with respect to trade in goods. Currently, goods are freely traded between the EU and the U.K. through the Single Market, which is a construct of the Treaties and secondary EU law based on the Treaties. If the Treaties cease to have effect, the U.K. is no longer part of that market. The relationship between the EU and the U.K. would then be governed by WTO law, as both the U.K. and the EU are members of the WTO. Under the GATT, the WTO Agreement covering trade in goods, members are obliged to grant all WTO members “most-favoured nation” treatment, i.e., fundamentally, a WTO member has to treat all other WTO members alike unless it has concluded a free trade agreement with a member on better terms. Both the EU and the U.K. would, accordingly, be obliged to treat their former partner in the Single Market like any other WTO member, which implies that they have to impose the same tariffs on goods imported from that partner as they impose on goods imported from third countries. Those tariffs are contained in the EU’s Common Customs Tariff, which is currently already applied by the U.K. to goods imported from third countries. Thus, in the future, U.K. exports to the EU would be subject to tariffs as would U.K. imports from the EU. Both of these tariffs would hurt U.K. industry. This is obvious for the former tariff, which would raise the price of U.K. goods and make them less competitive. However, it is also true for the latter tariff: today’s products rely on production steps in various countries and imported goods are often merely components of other products. U.K. car manufacturers, e.g., source parts from numerous countries in an attempt to maximize quality and minimize price. If the U.K. leaves the Single Market, parts imported from the EU will become more expensive, with the result of reducing margins, raising the price of the final product or forcing the manufacturer to look for cheaper, lower-quality alternatives.

2.5 Legal regime during the negotiations or: can the U.K. negotiate trade deals?

The scenario of losing access to the Single Market has led the current British government to look for alternatives and scout for possible free trade agreements with other countries. This

75 DÖRR IN E. GRABITZ ET AL. (ED), DAS RECHT DER EUROPÄISCHEN UNION: EUV/AEUV (58th ed. 2016), Art. 50 paras 36.
77 This is the result of the obligation to grant most-favoured-nation treatment provided for in GATT, art. I. An exemption from that obligation for free trade agreements is contained in GATT, art. XXIV.
raises the question whether the U.K. can negotiate free trade agreements with third countries while it is in the process of negotiating an agreement with the EU under Article 50 of the TEU.

The answer to this question can be found in the EU Treaties. Under Article 50 of the TEU, those Treaties remain in force during the two-year period (and any prolongation of it) after notice is given or until a withdrawal agreement enters into force. Under Article 207 and Article 3(1)(e) of the TFEU, however, the Common Commercial Policy, which includes trade agreements on the subject matters listed in Article 207 of the TFEU, is an exclusive competence of the EU and has been for decades. Where a competence is exclusive, Member States are barred from exercising it. Article 2(1) of the TFEU provides in this regard:

When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Article 3(2) of the TFEU states:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

It is undisputed that the competence to conclude trade agreements is an exclusive competence of the EU and the U.K. will be barred from concluding such agreements as long as it is still bound by the Treaties. It is in dispute, however, to what extent negotiating trade agreements is also an exclusive domain of the Union. Two lines of arguments are possible in that regard. The first would regard negotiation and conclusion of trade agreements (mentioned as a “set” in Article 207(3) of the TFEU) as both falling under the exclusive competence of the Union without further ado. A second argument regards the conclusion of trade agreements as an exclusive competence but considers the negotiating of trade agreements by Member States as excluded due to the obligation of sincere cooperation under Article 4(3) of the TEU. Under the first line of thinking, the notice under Article 50 of the TEU would not change the U.K.’s obligation to refrain from negotiating trade agreements. The notion that there is an
“exclusive competence to negotiate and conclude” agreements has repeatedly been referred to by Advocate Generals of the CJEU. The second line of thinking grants the possibility of some flexibility. One could argue that with the withdrawal of the Member State approaching, the content of the obligation of sincere cooperation changes. However, that argument does not necessarily imply that the U.K. can then negotiate trade agreements: negotiating trade agreements would still throw a wrench into the EU’s commercial policy and the better argument favors cooperative action of the EU and the U.K. towards third states.

However, the dispute is entirely academic. For practical reasons, the U.K. will not be able to engage in serious negotiations of trade agreements before withdrawing from the EU. This is not due to the much-discussed lack of trade negotiators of the U.K., which (after all) has not negotiated free trade agreements for decades. It is, rather, a function of the insecurity of U.K. law until the U.K. has clarified its relationship with the EU. Numerous fields of law that are of essential interest for negotiating trade deals are currently regulated by EU law. The U.K. has not reached an internal consensus on what rules it wants to govern in the future in that regard. No country can afford to commit the resources necessary for negotiating a trade deal (which, nowadays, goes far beyond mere tariff negotiations and encompasses legal rules from intellectual property to agricultural subsidies to environmental protection) as long as it is unclear which national rules apply.

3. CONCLUSION
The road towards Brexit raises complex questions of U.K. constitutional and EU law. While some of these, such as the question whether action by Parliament is needed to take the legal decision to leave the EU, will be resolved comparatively quickly, others will prove to be much thornier. The difficulties ahead are illustrated by the efforts undertaken by the U.K. government to build up the bureaucracy needed to tackle the challenges. Prime Minister Theresa May’s government created new government departments for Brexit and international

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trade. However, as of August 2016, these departments were reported not to be in a position to negotiate the U.K.’s withdrawal from the EU.  

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