Ruairi O'Neill
University of Warsaw

THE CONSTITUTIONAL CASE FOR MAKING THE ARTICLE 50 TEU NOTIFICATION

INTRODUCTION

Section 1(1) of the European Union Referendum Act 2015, given Royal Assent on December 17, 2015[1], required a referendum to be held before the end of 2017 on whether the UK should remain a Member State of the European Union. By way of secondary implementing legislation[2], the date for the referendum was declared as June 23, 2016. On this date, 52% of individuals who voted in the referendum voted to leave the European Union. Given that the United Kingdom does not have a single, written constitution, there has been sustained debate since then as to precisely *how* the UK can leave the European Union. This article will aim to discuss the key problems, both legal and political, inherent in this constitutional debate, and to hypothesise on the appropriate procedures that must be followed for initiating the process of leaving the EU, both at the EU and national level, as well as the requirements to be met by the UK for totally decoupling from the EU legal system. The first step is to consider the Treaty basis for commencing withdrawal: art. 50 TEU.

1. ARTICLE 50 TEU

Article 50(1) TEU states that a Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. Article 50(2) further adds that the withdrawing Member State has an obligation to notify

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Footnotes in the article have been prepared according to OSCOLA (Oxford Standard for the Citation of Legal. Authorities) standards.

[1] See http://www.legislation.gov.uk/ukpga/2015/36/contents (visited August 16, 2016).

[2] Regulation 3 of the European Union Referendum (Date of Referendum etc.), Regulations 2016.

the European Council of its decision, which is followed by negotiations with the European Council resulting in a withdrawal agreement between the withdrawing Member State on the one hand, and the EU acting under its powers to enter into agreements with third countries under art. 218 TFEU on the other. Once officially commenced, the process of withdrawal must conclude within two years, and can only be extended with unanimous consent of all members of the European Council (art. 50(3) TEU).

Not including the withdrawal of Greenland from the EEC in 1985 to become an overseas territory of an EU Member State following its accession in 1973 as a dominion of Denmark and subsequent referendum result in 1982 to withdraw[3], no fully-fledged Member State has ever left the European Union. Furthermore, art. 50 TEU has only been in existence since the entry into force of the Lisbon Amending Treaty of 2009, and was established to ensure that membership of the EU was voluntary[4], as well as to prevent 'awkward' Member States from being ejected from the Union against their will[5]. Careful analysis of art. 50 TEU is therefore necessary in order to understand the obligations of both the EU and the UK in withdrawal negotiations.

Article 50(1) TEU

Art. 50(1) TEU assumes that all Member States possess constitutional mechanisms to facilitate withdrawal from an international organisation such as the EU. The debate in the UK has focussed on four possible mechanisms that can be utilised, with the Government at the time of writing having already settled on one such mechanism: The Royal Prerogative[6].

Before considering the main mechanisms under consideration, there has been a fifth, plainly incorrect, theory, that the referendum result itself is the constitutional requirement required by EU law, and that prompt notification of this result is demanded by art. 50 TFEU. This theory stems from art. 5 of the European Parliament Resolution of June 28, 2016 on the decision to leave the EU resulting from the UK referendum[7], which states that the European Parliament:

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[3] See http://ec.europa.eu/europeaid/countries/greenland_en (visited August 16, 2016).

[4] European Commission Explanatory Notes on the Lisbon Treaty, December 1, 2009, available at http://europa.eu/rapid/press-release_MEMO-09-531_en.htm?locale=en (visited August 16, 2016).

[5] D. Andrew, *Everything you need to know about Article 50 (but were afraid to ask), VerfBlog*, 2016/7/04, at http://verfassungsblog.de/brexit-article-50-duff/ (visited August 16, 2016).

[6] House of Commons Library Briefing Paper No.07632, 'Brexit: what next?' (June 30, 2016) pp. 11−12, available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632#fullreport

[7] 2016/2800(RSP) (visited August 16, 2016), available here: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/2800(RSP) (visited August 16, 2016).

"(...) expects the UK Prime Minister to notify the outcome of the referendum to the European Council of 28–29 June 2016; this notification will launch the withdrawal procedure"[8].

This view, adopted by the majority in the European Parliament, could be based on the assumption that the UK has the same constitutional tradition as other Member States, such as Ireland, where referendums are required to give effect to important changes to the national constitutional order. In the UK, however, referendums are rarely utilised, and when they are used, they usually exercise a pre-legislative advisory role for Parliament, which retains the legal discretion to give effect to the results of referendums. An example of this type of referendum was the first referendum on continuing membership of the EEC, which was held in 1975.

Only occasionally can referendums force legislative change, such as with the referendum on adopting alternative voting (AV) for Parliamentary elections, which took place on May 5, 2011, pursuant to Section 1 of the Parliamentary Voting System and Constituencies Act 2011. The result of the referendum was negative, thus retaining the first-past-the-post voting system, but had it succeeded, Section 8(1) of the Act required the Minister to present a draft Order to Parliament which, if then successfully adopted by the legislature, would implement the AV voting system for the next subsequent parliamentary election[9]. What is clear is that, while this referendum compelled the Government to introduce draft legislation to change existing provisions, it was still subject to the ultimate approval of Parliament, thus confirming the most vital Constitutional Convention of Parliamentary Sovereignty: the principle that the Westminster Parliament theoretically retains sovereignty over all legislative matters.

Thus is it clear that the decision to give effect to the referendum result and invoke art. 50 TFEU lies with the competent *national* authorities; the next question being 'which' national authority is competent?

2. THE ROYAL PREROGATIVE

The first dominant theory on the applicable constitutional provision for the invocation of art. 50 TEU is that the Government retains the prerogative power to make the art. 50 TEU notification to the European Council, without authorisation from Parliament. The prerogative powers are considered to be those discretionary

[8] See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0294+0+DOC+XML+V0//EN&language=EN (visited August 16, 2016).

[9] Section 8(3)(a) requires that the new voting system comes into effect on the same day as the coming into force of the Order in Council.

powers that the Crown retains either because they have not been abolished by Parliament or replaced by statutory powers[10]. In *Council of Civil Service Unions v Minister for the Civil Service* (the GCHQ case)[11], Lord Diplock added to the definition that the exercise of the power must have some legal effect, describing the prerogative as:

"A residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent on any statutory authorisation but nevertheless have consequences on the private rights or legitimate expectations of other persons".

In a subsequent judgment of *Secretary of State for the Home Department ex parte The Fire Brigades Union*[12], the House of Lords considered the relationship between the Prerogative Power and statute, where Lord Browne-Wilkinson stated that:

"...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 as expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme...".

In a majority decision, the House of Lords held that the Secretary of State had abused his power through the exercise of the Royal Prerogative in a way that directly conflicted with an existing statutory obligation. What this is generally taken to mean is that the prerogative powers cannot be used to take a power away from Parliament, where statute law already exists and the Government wishes to circumvent the application of primary law through its own actions.

Historically, however, the courts of the UK have denied that they had jurisdiction to review the exercise of the Royal Prerogative[13], though it is now accepted that if the Government claims to have exercised the Prerogative Power and that action is then challenged in judicial review proceedings, the courts will assess firstly whether the power exists and then consider under the normal principles of judicial review whether the power was exercised properly[14]. The first major judgment where the courts showed a willingness to review the exercise of the prerogative power was *Council of Civil Service Unions v Minister for the Civil Service*[15], which concerned judicial review of an oral decision by the Prime Minister in the field of national security, which was itself taken pursuant to an Order in Council adopted under the Royal Prerogative. Overturning the Court of Appeal ruling that judicial review cannot be used to challenge the exercise of the Royal

[10] Dicey (1885) 10th edn 1959, London: Macmillan & Co, p. 424.

[11] [1985] 1 AC 374 [409-10].

[12] [1995] 2 AC 513.

[13] *Attorney-General Appellant v De Keyser's Royal Hotel* [1920] A.C. 508.

[14] For more, B. Hatfield, *Judicial Review and the Prerogative Powers*, (in:) M. Sunkin, S. Payne (eds.), *The Nature of the Crown*, Oxford, Oxford University Press 1999, Ch 8.

[15] n11.

Prerogative, the House of Lords held that certain actions taken under the Royal Prerogative were justiciable, but qualified this statement by saying that some matters were not amenable for judicial review, such as those relating to the making of treaties[16]. The justiciability of the exercise of Royal Prerogatives was further developed in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*[17], with Lord Hoffmann stating that a prerogative Order in Council has the status of primary law in the UK[18], adding that:

"...The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality... I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action"[19].

Where art. 50 TEU is concerned, the issue is whether the notification can be categorised as the exercise of the Royal Prerogative as it relates to international treaties, but equally important is whether the existence of the European Communities Act 1972 ("EC Act 1972), which gives effect to EU law within the UK legal order, precludes the exercise of the Royal prerogative should one be deemed to exist.

In *Blackburn v. Attorney General*[20] Lord Denning stated that:

"The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treaty, even a treaty of such paramount importance as [the EEC Treaty], they ... exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts".

Furthermore, in *R (on the application of Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs*[21], Lord Carnwath and Lord Mance argued:

"60. The issue which divides the parties is, in short, whether there exists in relation to prerogative powers any principle paralleling that which, in relation to statutory powers, precludes the holder of the statutory power from deciding that he will only ever exercise the power in one sense.

61. The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances. But prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external

[16] Lord Roskill, p. 417.
[17] [2008] UKHL 61.
[18] Ibid [34].
[19] Ibid [35].
[20] (1971) CA.
[21] [2014] UKSC 44.

originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion"[22].

Thus, it can be said that there is a clear distinction between the exercise of the Prerogative Power and statutory powers, since the Act of Parliament will usually offer guidance as to how a power should be exercised in a given circumstance, whereas with the prerogative there is no source legislation other than the inherent power of the Crown, and thus it is for the Crown to determine the extent of the exercise of that power. Thus, in the absence of a statutory power limiting the exercise of Royal Prerogative, the scope of that power can be determined exclusively by Government. A major question mark hovers over the issue whether the EC Act 1972 limits the regulates and puts into statutory form the prerogative power in relation to the art. 50 TEU notification.

3. THE PREROGATIVE POWER LIMITED BY THE EC ACT 1972

The EC Act 1972 was adopted to give effect to the UK's membership of the European Union. Section 2 of the Act provides that all rights, liabilities, obligations and restrictions arising under the Treaties are part of UK law. Section 2(1) states 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, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies".

Further, Section 2(2) of the Act states that:

"any designated Minister or department may ... make provision −

(a) for the purpose of ... enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised".

Thus one possible argument against the use of the Royal Prerogative to make the art. 50 TEU notification is that to do so would render application of the EC Act 1972 ineffective[23]. The first criticism of this argument is that notification

[22] Ibid [60-61].

[23] N. Barber, T. Hickman, J. King, *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, UK Constytutional Law Association, Blog, June 27, 2016, at https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/ (visited January 17, 2017).

of withdrawal under art. 50 TEU by the Government would not have the automatic effect of rendering the EC Act 1972 ineffective; notification merely activates the procedure in EU law whereby the UK will prepare for withdrawal from the European Union. Under the prerogative, the Government retains the power to ratify the withdrawal treaty with the EU, and once that treaty enters into force, the UK will no longer have an international obligation to comply with EU law. But even then, the EC Act 1972 will continue to exist until Parliament annuls it, with EU law continuing to exist in the UK legal order, either as implemented UK secondary law or as directly applicable EU law applied under Section 2(1) of the EC Act. In the same way that candidate countries wishing to join the EU often implement EU law before having either a strict obligation to do so or the ability for making references to the Court of Justice of the EU (hereafter "CJEU") to ensure compliance, a country that has left the EU will likely continue to apply EU law through incidental harmonisation[24]. Additionally, until the UK signs the withdrawal agreement, it will be under an obligation to comply with EU law, so repeal of the Act prior to withdrawal would additionally amount to a breach of the UK's obligation of mutual respect under art. 4(3) TEU.

The second problem with the argument that the existence of the EC Act 1972 precludes the application of the Royal Prerogative to make the art. 50 TEU notification is that Section 2(2) of the Act provides the Government with the power to implement and give effect to EU law without requiring an Act of Parliament in every instance where an obligation arises under EU law, such as with the adoption of an EU directive; a power which could extend to the making of the art. 50 TEU notification.

The situation whereby a prerogative power and a power under statute overlap was dealt with by Lord Atkinson in *Attorney-General Appellant v De Keyser's Royal Hotel*[25], when he stated that:

"... such a statute ... abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions and that its prerogative power to do that thing is in abeyance ... after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been"[26].

Thus it can be said that since Section 2(2) furnishes the Government with the power to adopt secondary laws (specifically "order, rules, regulations or scheme") to give effect to EU law without the need for recourse to Parliament, then the Government is fully entitled to make the notification under art. 50 TEU, as an obligation under EU law, pursuant to the 1972 Act: If weight is to be given to this

[24] Implementation of EU law in a non-EU context.

[25] n12.

[26] At p. 540.

theory, the conclusion must then be that the Government cannot use the prerogative to make the art. 50 TEU notification without recourse to Parliament because the power to make the notification has been codified in Statute and thus the power for the Government can only be derived from Section 2(1) of the EC Act, since Parliament created this right, thus limiting the Royal Prerogative when it comes to EU law. However, the unfortunate wording of Section 2(2) indicates that the Government *may* implement EU law by means of statutory instruments, leaving open the possibility that a literal interpretation of the statute could allow it to use alternative means to achieve the same effect of making the notification, since there is no obligation to enact EU law by means of secondary law and also because the notification is unlikely to take the form of a statutory instrument. It could thus be argued that the EC Act 1972 does not limit the exercise of the prerogative but simply provides an alternative mechanism for justifying the decision to make the art. 50 TEU notification without authorisation from Parliament.

4. SOME CONCLUSION ON THE ART 50 TEU NOTIFICATION

While the question of authority is not clearly discernible in the absence of defined and accessible constitutional rules, it is possible to make a number of conclusions at this point. The first is that the exercise of a right or obligation contained in an international treaty falls within the Royal Prerogative, unless that power has been limited or restricted by an Act of Parliament. In this case, the notification under art. 50 TEU is a right contained in a treaty, which, unless limited by Parliament, is exercisable under the prerogative. As an exercisable EU right, the Government has the choice to make the notification after authorisation is confirmed in secondary law; this, though, would seem like an unnecessary additional burden, as it would have the absurd result of the same organ of state empowering itself to act. It is submitted that nothing in the EC Act 1972 restricts the Government in the exercise of this right, which in turn does not have the automatic effect of frustrating the will of Parliament, given that all EU law will continue to apply in the UK legal system until the withdrawal agreement is ratified and primary law is enacted to define the precise status of EU law following Brexit.

5. AUTHORITY OF PARLIAMENT TO AUTHORISE NOTIFICATION TO THE COUNCIL OF WITHDRAWAL

Geoffrey Robertson QC, writing in the Guardian Newspaper, argued that art. 50 TEU allows notification to be made in compliance with national constitu-

tional requirements and that "the UK's most fundamental constitutional requirement is that there must first be the approval of its parliament"[27]. The constitutional provision he is referring to is that of Parliamentary Sovereignty; the most important constitutional convention that puts Parliament at the apex of the UK legal system.

In the House of Commons Briefing Paper on Brexit[28], the proposition in favour of Parliamentary approval before the notification is made is derived from the common law principle found in *The Case of Proclamations*[29] and *Fire Brigade Unions* case[30] that the Royal Prerogative may only be used if it does not conflict with an Act of Parliament. The Act in question is the EC Act 1972, though affected legislation includes the European Parliamentary Elections Act 2002, which provides for European Parliament voting and representation rights. Rather than strengthen the proposition that Parliamentary approval is necessary before the Government can make the art. 50 TEU notification, this argument instead lends more weight to the proposition that Section 2(2) of the EC Act 1972 provides the proper authority to make the notification, since this is the Act of Parliament that empowers the Government to give effect to EU law.

Finally, the House of Commons Briefing Paper proposes that, because Parliament gave effect to the Lisbon Treaty, which included art. 50 TEU, in the European Union (Amendment) Act 2008, approval has already been given to the Government to make the notification without authorisation[31]. From a purely legal point of view, this cannot be the correct constitutional position, because giving effect to art. 50 TEU as part of primary EU law is not synonymous with having in place the national constitutional requirements that art. 50 TEU requires in order to give it effect. Rather, art. 50 TEU created an obligation for Member States to have such arrangements in place as part of national constitutional law.

This is, nevertheless, a purely legal perspective on which institution possesses the technical authority to make the notification; from a political perspective, there are valid reasons for the Government to include Parliament in the withdrawal process, as the EC Act 1972 itself will have to be repealed and legislation will have to be introduced to clarify which internal market regulations will remain in force as part of UK law, not least with regard to the status of EU citizens residing in the UK. Thus, while it is probable that Parliament will not have to be consulted prior to the notification being made, it is likely it will have a strong voice in the negotiations that will determine the outcome of Brexit.

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[27] The Guardian, June 27, 2016, available at https://www.theguardian.com/commentisfree/2016/jun/27/stop-brexit-mp-vote-referendum-members-parliament-act-europe (visited August 26, 2016).

[28] n6.

[29] n10.

[30] n11.

[31] n6, p. 14.

6. REPEAL OF THE EC ACT 1972

As a dualist legal system, the United Kingdom's international obligations are not effective and justiciable in the UK in the absence of national implementing law. As such, even when the Government signs and ratifies the withdrawal agreement, thus ending the UK's public international law obligation to comply with all EU law obligations, until the EC Act 1972 is repealed, EU law will continue to have effect creating rights and obligations in the national legal system. Thus, even if the Government does not seek authorisation for the art. 50 TEU notification which will launch withdrawal negotiations, Parliament will be crucial in giving effect to any eventual conclusions. Two important considerations within the sphere of legal certainty and proper application of the rule of law are worthy of discussion at this point: how UK courts will treat EU law during the withdrawal process, and how the EU courts will treat UK obligations once the withdrawal agreement comes into effect.

7. WITHDRAWAL

7.1. "SHALL" MAKE A REFERENCE

Up until this point, this article has focussed on the nature and effect of the withdrawal process. What if the UK does not make a timely notification of commencement of the withdrawal process? It is argued that art. 50 TEU exists precisely to prevent any Member State of EU Institution from forcing another Member State to withdraw from the EU, so it is clear that the power to make the art. 50 TEU notification lies with the UK. Even given this, art. 50(2) TEU clearly states that a Member State intending to leave the EU "shall" notify the European Council of its intention to withdraw from the Union. While there are clear advantages for the rest of the EU in making this process as swift and certain as possible, there are far fewer benefits for the UK to bind itself in a two-year intensive process of withdrawal without first knowing what will await it at the end of this period. The timing of the art. 50 TEU notification is therefore important for both negotiating parties, but can the UK be compelled to make the reference?

As has already been considered, the referendum result of June 23, 2016 is not binding on the UK legislature and does not compel the Government to withdraw from the EU; it is purely advisory in nature. The decision to actually withdraw from the EU lies entirely with Parliament, and with the Government, should it decide to make the notification of withdrawal. This section will look first at whether the Institutions can compel the UK to make the art. 50 TEU notification, followed by assessment of whether the notification can be withdrawn in any circumstance.

7.2. CAN THE UK BE COMPELLED?

The will of the majority of the electorate of the UK have voted to leave the EU, and the Government has not yet given any indication when it will start the withdrawal process, with one of the two potential leaders of Her Majesty's Loyal Opposition vowing to demand a General Election and campaign to remain in the EU should he win the leadership election concluding on September 24, 2016[32]. It has been argued that the European Commission could initiate infringement proceedings against the UK for failure to make the notification in reasonable time, arguably as a breach of the duty of loyal cooperation under art. 4(3) TEU.

It is submitted by this article that, as neither the enabling legislation for the referendum or its result create a legally binding obligation on the UK institutions to withdraw from the EU, art. 50 TEU also does not create a binding obligation to make the notification of withdrawal in any specific timeframe. Anything short of a legally enforceable duty to act in EU law cannot amount to a duty of loyal cooperation under art. 4(3) TEU[33].

7.3. CAN A NOTIFICATION BE WITHDRAWN?

Article 50 TEU does not make any reference to whether a notification can be withdrawn, so the answer can only be found in the rules of public international law. As mentioned in the House of Commons Briefing Paper[34], art. 68 of the Vienna Convention on the Law of Treaties states that a notification of intention to withdraw from a treaty "may be revoked at any time before it takes effect". Therefore, unless the TEU provided for revocation of the notification of withdrawal, the UK ought to be able to revoke the notification at any point until the end of the withdrawal process[35].

8. CONCLUDING REMARKS

While there is a lot of uncertainty as to whether the UK *will* actually even leave the EU, and especially when and how it will officially commence the withdrawal procedure, this article attempted to clarify the legal issues inherent in the

[32] The Guardian, accessed August 31, 2016, available at http://www.theguardian.com/politics/2016/aug/24/owen-smith-labour-should-continue-to-fight-brexit (visited August 26, 2016).

[33] For example, in Case C-246/07 *Commission v Sweden* [2010] ECR I-3317 concerning conflicting obligations under EU law and international treaties.

[34] n6, p. 16.

[35] L. R. Helfer, *Exiting Treaties*, "Virginia Law Review" 2005, Vol. 91, p.1579.

discussion, and further tried to refrain from making political assumptions which are central to the overall debate. When considering the constitutional procedures that the UK can utilise when making the art. 50 TEU notification, the most probably legal conclusion is that the notification is a reserved power under the Royal Prerogative, which the Government may exercise without authorisation from Parliament. Due to this conclusion, it is felt that there is no need to consider if and how the convention of Parliamentary Supremacy may have been affected by the use of a referendum to initiate Brexit and by the different results from the regions of the UK that now possess a degree of devolved power; the exercise of the Prerogative, however politically complex and constitutionally unfair it may seem, rests solely with Government.

This is not to suggest in any way that Parliament or the countries that make up the UK will not be consulted or included in withdrawal negotiations, but simply that the constitutional requirement is not there. Given that several judicial review proceedings have been launched following the referendum concerning its validity and enforceability, in coming months it is hoped that a clear, legally certain roadmap and action plan will soon be in place and the debate on the foundations upon which withdrawal will be developed will conclude.

Additionally, this article attempted to consider additional legal consequences of the art. 50 TEU notification, such as whether the UK can be forced to leave the EU or whether the UK had the power to retract a withdrawal notification. Without much legal authority to base it on, it is concluded that the UK can definitely not be compelled to commence withdrawal proceedings, given the unilateral language of art. 50 TEU. Harder to answer, and possibly an issue that only the Court of Justice can answer, and quite possibly will at some point soon, is whether the UK will be able to retract the withdrawal notice once it is made. Unfortunately, it is beyond this article to even start to hypothesise on this one.

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Summary

In a referendum held on June 23, 2016, the United Kingdom voted in favour of leaving the European Union. For the first time since its creation in the Lisbon Reform Treaty of 2009, art. 50 TEU will probably now be invoked by the UK for the withdrawal process from the EU, envisaged by the outcome of the referendum, to commence. Article 50 TEU requires that national constitutional arrangements exist so that notification on withdrawal

can be made to the European Council. Curiously, to date, the biggest consequence of the referendum outcome has not been the creation of a debate about the role of EU law in the UK legal order, but rather the separation of powers within the UK's unwritten constitution and which organ of state has authority to activate the art. 50 TEU withdrawal: Parliament or the Executive. The debate has spawned dozens of constitutional blog posts, numerous academic articles, a High Court judicial review of the Government's position, a second draft independence bill published by the Scottish Government and a judicial review before the Northern Irish Court of Appeal. On one side of the debate, the Government maintains that it alone possesses the Royal Prerogative to ratify and withdraw from international treaties, and thus to make the notification of withdrawal. On the other hand, Parliament and the 'Bremainers' maintain that any unilateral action by the Government exceeds its authority, and Parliament must provide authorisation; a position which could ultimately result in the referendum outcome being ignored and the UK remaining a Member State. In a third corner, the governments of Scotland and Northern Ireland, two countries within the UK whose electorates voted to remain in the EU, demand a voice in both the decision to leave and in the subsequent negotiations with the EU institutions (note, however, that the status of the devolved administrations will not be addressed in this article, as the issue is considered by the author as being too unclear in the absence of any judicial statement on matters of devolution and institutional hierarchy, including but not limited to the limitations imposed on the doctrine of Parliamentary Sovereignty by the Sewel Convention). The judgment of the High Court has not yet been published, and even if it were there will inevitably be an appeal to the Supreme Court, so it is only possible to speculate on what will happen, but this article intends to provide clarity on the legal principles currently under discussion in the most important constitutional discussion to happen in the UK since it joined the EU in 1973.

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SŁOWA KLUCZOWE

BREXIT, prawo konstytucyjne, prawo Unii Europejskiej, prawo brytyjskie