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Paul Craig

There are difficult legal issues flowing from Brexit, more especially because this is uncharted territory. The process is governed by Article 50 TEU, which is the sole mechanism for exit. Thus while the right to exit may flow from the Vienna Convention of the Law of Treaties 1969, VCLT, it makes clear, as will be seen below, that withdrawal must be done in accord with procedures under the particular treaty, where they exist.[2] The ensuing discussion focuses on three key issues: the trigger for invocation of Article 50, whether the process can be stopped when it has begun, and the nature of the resulting agreement. There are therefore issues that relate to the beginning, the middle and the end of the Article 50 process.

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
> A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
> 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

1 The Beginning: Invoking Article 50

[1] This is the last part of an article, 'Brexit: A Drama in Six Acts', forthcoming in the August issue of the European Law Review.

[2] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), para. 14.

1) Article 50(1) is clear: the trigger for withdrawal is a matter for UK law to be decided in accord with our constitutional requirements. There has, however, been heated debate via blogs and the like as to what those constitutional requirements are, more particularly the degree of Parliamentary involvement that should be required before notification is given. It may be helpful to distinguish three different models concerning the constitutional trigger.

2) The first view is what may be termed the *classic parliamentary power model*, which can be presented as follows. The referendum was not formally binding on Parliament, but merely advisory. This flows from the nature of Parliamentary sovereignty as a principle of UK constitutional law, and from the fact that MPs are perceived as Burkean representatives and not as delegates of the voters. Parliament could therefore in theory ignore the referendum, although this is very unlikely in reality. It would, however, be perfectly legitimate for Parliament to demand a debate prior to the triggering of Article 50, and/or legislation to authorize invocation of Article 50(1), in order that the implications of exit could be considered. There is a strong argument that Parliament should exercise voice in this manner, because of the seminal importance of the issue, and the widespread feeling that notwithstanding efforts by various organizations to keep the referendum debate factually honest, the voters were nonetheless misled repeatedly, most especially by the Leave Camp.

3) It is nonetheless also acknowledged as part of this first model that the executive has prerogative power under the UK constitution, which includes the conduct of foreign relations. It falls within the executive's prerogative power to negotiate international treaties, and this includes amendments thereto and withdrawal therefrom. Those who subscribe to this first view would therefore conclude that the executive can, acting

pursuant to the prerogative, trigger Article 50 by making the requisite notification, unless Parliament demands further consideration of the issue prior to this being done. Parliament thus has the onus of seeking further debate/legislation, and if it does not do so then the executive can decide when it wishes to invoke Article 50(1), which includes in this respect the possibility that the executive would consider it advisable to seek parliamentary authorization before doing so, even where the Parliament has not demanded this.

4) The second model is a modification of the first, and is framed in terms of *parliamentary power plus executive duty*. It is central to the second view that the scope of prerogative power can be altered by constitutional convention. Thus whereas an issue might hitherto have been regarded as falling within prerogative power to be exercised by the executive, this might be constrained by the need to seek parliamentary approval. This is exemplified by the prerogative in relation to the making of war and peace, which traditionally fell within the untrammelled authority of the executive.[3] It is, however, now generally accepted that the executive must seek parliamentary authorization before committing the UK to war. It is exemplified once again by the Ponsonby rule, whereby post 1924 it came to be accepted that ratification of an international treaty would only occur after Parliament had the opportunity to consider the text of the treaty.

5) It could therefore be argued that while the executive has the power to negotiate treaties, including withdrawal, it should nonetheless be required to seek parliamentary approval before embarking on such an exercise where a major treaty change is involved. The crucial difference is that on the second view the onus would lie with the executive to secure the requisite approval, and if it did not do so then the exercise of the prerogative

[3] R. Joseph, *The War Prerogative, History, Reform and Constitutional Design* (Oxford University Press, 2013).

power would be regarded as unconstitutional. It is not however clear whether this is regarded as the constitutional status quo, or something that would be constitutionally desirable. The empirical foundation for the former claim has to be sustained, and the line between 'is' and 'ought' cannot be magically wished away. Nor moreover is the form of such parliamentary authorization clear. There are important differences between demanding approval through parliamentary resolution and through formal statute.

6) The third model is that of *actionable legal constraint*. On this view prerogative power is legally constrained and these constraints are applicable to the instant situation, such that invocation of Article 50(1) would require some form of statutory approval. The essence of the argument is as follows. The *Case of Proclamations*[4] established that the King did not possess any general regulatory economic power that could be exercised independently of Parliament, and that the prerogative could not alter the common law, statute or custom. The *De Keyser* case[5] carried this logic one stage further. It established that where Parliament had spoken on an issue the executive could not have recourse to any prerogative power that touched the same subject matter. The decision, therefore, denied that prerogative power and statutory authority could exist in parallel. Where the democratically elected Parliament had regulated an area then the executive had to follow the conditions laid down in the relevant statute, and could not seek a more advantageous result by claiming that a prerogative power could still be relied upon. It has been argued that triggering Article 50 TEU through the prerogative will render the

[4] (1611) 12 Co. Rep. 74.

[5] *Attorney General* v. *De Keyser's Royal Hotel* [1920] A.C. 508; *R.* v. *Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 A.C. 513.

European Communities Act 1972 nugatory.[6] The contention is that there is a clash between the prerogative and a statute, and that in accord with the principle in *De Keyser* the former must be constrained, such that the ECA 1972 can only be modified by a later statute.

7) There are considerable difficulties with this argument. The invocation of Article 50(1) has no legal effect as such on the ECA 1972, nor does the 1972 Act say anything about the procedure for withdrawal from the EU Treaties. The analogy with *De Keyser* is therefore misplaced. To be sure if the withdrawal agreement is concluded then the ECA 1972 will have nothing to bite on and will be duly repealed. The repeal will, however, be through a statute enacted in the proper manner by Parliament. It is of course inevitable that if the UK decides to withdraw from any treaty then the legislation that duly incorporated the treaty into UK law will be repealed. To regard this as coming within the *De Keyser* principle would however radically change it. The new principle would be that the executive could not exercise the prerogative power to begin the process of amending or withdrawing from a treaty, because this very initiation would impact on, or cut across, the legislation through which that treaty had earlier been incorporated into UK law. There is to my knowledge no case that comes close to establishing this proposition.

8) The difference between the *De Keyser* principle and the present situation is also evident at the remedial level. The remedial position in *De Keyser* flows inexorably from its central logic: the state is compelled to apply the relevant statutory rules and cannot circumvent these through the prerogative. There is no such analogy in relation to the ECA 1972, since it says nothing about the procedure for withdrawal, and notification

[6] N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', 27 June 2016, https://ukconstitutionallaw.org/blog/.

under Article 50(1) TEU does not affect its legal status. This begs an interesting question as to what the court would be declaring if it acceded to the type of argument considered here. It could not require that the 1972 Act be repealed prior to an Article 50 notification, since the UK remains a member of the EU until the withdrawal agreement is concluded, and repeal would remove the basis on which EU rights take effect in the UK. The assumption appears to be that the court might declare that a statute approving the Article 50 notification process is necessary, with the hope that this will provide the forum for more considered parliamentary reflection as to whether we should proceed to exit or not. UK courts would, however, be reluctant to intervene in the parliamentary process in this manner, and there is no guarantee that it would provide the discursive forum desired. There would by definition be no details of any future negotiation on the table at this time, and the danger is that it would quickly become a re-run of the referendum debates of the previous two months. It would in reality be difficult for Parliament to do anything other than give the green light to triggering Article 50. There is a real problem with safeguarding parliamentary voice, but as will be seen below this is more acute during the latter part of the Article 50 process, not the inception thereof.

2 The Middle: The Article 50 Process

9) The debate concerning the constitutional trigger for invocation of Article 50 has been affected, as seen above, by differing views as to whether the process can be stopped when it has begun. The interpretation of Article 50 is a matter of EU law, and it is

contestable. The better view[7] nonetheless is that it can be stopped by the Member State once it has been invoked in the circumstances set out below. This is supported by arguments of principle, text and teleology.

10) The *argument of principle* is as follows. The right to withdraw from an international treaty flows from public international law, more specifically the VCLT. Article 42 VCLT stipulates that withdrawal of a party may take place only as a result of the application of the provisions of the particular treaty, or of the VCLT; and Article 54 VCLT provides that withdrawal of a party may take place in conformity with the provisions of the particular treaty, or at any time by consent of all the parties after consultation with the other contracting States.[8] Article 50 TEU regulates the process through which withdrawal occurs; it is the mechanism through which the withdrawing state exercises the preceding right. It is moreover clear as a matter of principle that prior to withdrawal the Member State remains bound by all rights and obligations under EU law.

11) The *textual argument* hinges on the wording of Article 50(3). It is clear from Article 50(1) that notification of intent to withdraw is a unilateral decision for the Member State.[9] It has been argued that once the notification has been given the Member State

[7] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), paras. 10-13, where the same conclusion was reached by Sir David Edward and Derrick Wyatt.

[8] See also VCLT Art. 56, which provides that a treaty which contains no provision regarding withdrawal is not subject to withdrawal unless it is established that the parties intended to admit the possibility of withdrawal; or a right withdrawal may be implied by the nature of the treaty.

[9] There is no express time limit for invocation of Art. 50(1), but it is highly likely that the CJEU would regard it as subject to some implied limit, since otherwise it would be open to a Member State post a Brexit-type referendum to equivocate for years before deciding whether to withdraw, which could have serious negative consequences for the EU.

cannot rethink its position, since there is no provision within Article 50 allowing it to reverse the process. This ignores the specific wording of Article 50(3). It sets out two scenarios as to when the Treaties cease to apply to the State. This is either from the date of entry into force of the withdrawal agreement; or, failing that, two years after the notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. These are alternative scenarios, as is readily apparent from the wording and from the use of the disjunctive, 'or failing that'. It follows that before the two-year clock has run the Member State that has given notification could decide to rethink its position.[10] This is not reading a right into Article 50(3) that is not there. To the contrary it is the natural textual meaning. Prior to the two year period the Treaties continue to apply to the Member States until a withdrawal agreement has been made, and such an agreement requires the consent of the Member State and the EU. The Member State can, during this period, change its mind and withdraw from the exit negotiation. A further argument in favour of the Member State's ability to change its mind could be derived from Article 50(1), since it could be argued that if this occurred there would then no longer be a valid decision to withdraw, since the original decision had been changed in accordance with national constitutional requirements.[11]

12) The contrary interpretation precluding reversal would, moreover, lead to the following untenable conclusion. The idea that invocation of Article 50 could not be altered if there was a change in government within the two-year period makes no sense in political or normative terms, in particular because the intervening national election might have been fought precisely on whether the Member State should carry through with exit. The

[10] See also, *The Process of Withdrawing from the European Union* (HL 138; 2015-16), paras. 10-14.

[11] I am grateful to Jukka Snell for this suggestion.

problem would be even more acute if a Member States required a referendum to complete the exit, since there could then be a situation where a withdrawal agreement was rejected by the voters in the referendum.[12]

13) It might be argued by way of response that the preceding interpretation would allow a Member State repeatedly to invoke Article 50(1), and then exit the process before the two-year period in the manner adumbrated above. This would indeed be abusive, but it does not undermine the previous argument. The way to deal with such abuse is through legal interpretation that precludes it. Courts do this all the time. There is the world of difference between a Member State deciding bona fide that it does not wish to continue with withdrawal, and a Member State that seeks to play fast and loose by repeatedly invoking Article 50 and then resiling from it in order thereby to secure some hoped for advantage under the Treaties. This latter scenario is in any event far-fetched and would not be tolerated politically by the other Member States. The CJEU would have no difficulty in interpreting Article 50 to prevent its use in this manner. There would, moreover, be very real difficulties concerning the legal nature and enforceability of any such agreement/concession that the miscreant state sought to extract in this manner.

14) The preceding arguments of principle and text are supported by those of *teleology*, viewed from the perspective both of the EU and the Member State. From the EU's perspective the disruption caused by invocation of Article 50 should be duly acknowledged. It would nonetheless be outweighed by the very considerable gain where a Member State decided to remain in the EU when on the brink of departure, having realized the benefit of membership. The EU would not wish to be forced to push out of the door a state that had bona fide changed its mind. The construction of Article

[12] I am grateful to Alison Young for this point.

50 as a one-way street to exit once invoked therefore makes no sense when viewed from the EU's perspective. The same is true when viewed from the Member State's perspective. Let us imagine that the attempt to negotiate access to the single market without having to accept free movement has failed. The resultant deal would therefore be for the Member State to enter the EEA, pay large amounts into the budget, be bound by free movement rules, and social policies, but have no seat at the table when the EU rules are made. The Member State response might be to walk away from this deal, exit the EU, forego access to the single market and take its chances in negotiating some trade deal in the medium term. It might alternatively think that single market access really is very important, as attested to by the post-referendum downturn in economic performance, which would be further exacerbated if such access is not secured for the future. It might then think that the EEA option is in reality worse than continuing to remain in the EU, and that the voters should at the least have the opportunity to express an opinion on this before the matter was concluded. It would be extraordinary if this were to be precluded by an interpretation of Article 50 based on the assumption that once it was triggered it was a one-way street to exit.

3 The End: Constitutional Constraints on Conclusion of the Withdrawal Agreement

15) There are numerous contestable legal issues concerning the endgame of the Article 50 process. Space precludes detailed treatment of all such issues, which could well occupy a separate article. The ensuing discussion will focus on issues that are directly related to Brexit, and connected to matters discussed earlier.

16) First, Article 50 is uncharted territory and therefore the content of the withdrawal agreement is uncertain. This is so not merely with respect to the precise details of the future relationship between the EU and the UK, but also more fundamentally with

regard to what is put into the withdrawal agreement and what remains for resolution through some later treaty. Article 50 is ambiguous in this respect, and this is readily apparent from the wording of Article 50(2) TEU, which states that "in the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union." This wording leaves open a range of possibilities. At one end of the scale there could be an agreement that deals only with the core essentials of terminating the UK's current relationship with the EU, while leaving details concerning the future to be decided by a later treaty; at the other end of the scale there might be a much thicker withdrawal agreement that includes the detailed architecture to govern future interaction between the EU and the UK, being mindful of the warning from Richard III that the EU may not be in a giving mood at that time. There are of course intermediate possibilities along a spectrum. There are in addition complex issues concerning the inter-relationship between the two agreements. They might be negotiated and concluded at the same time, but it is nonetheless unlikely. Whether this occurs will depend in part on the respective content of the withdrawal agreement, and subsequent treaty. This in turn will impact on the parties to the respective agreements, since if there is a mixed agreement the Member States in addition to the EU will have to signify their consent in accord with their constitutional requirements.

17) Secondly, this will have constitutional implications for the UK. We have well-crafted rules concerning the ratification of international treaties. The modern position dates from 1924 and is known eponymously as the Ponsonby Rule. It provides that the executive, having concluded an international agreement pursuant to prerogative power, should place this before Parliament for 21 days before it is ratified. This rule was placed

on statutory footing by the Constitutional Reform and Governance Act 2010, section 20 of which states that if the House of Commons resolves within 21 days that the treaty[13] should not be ratified then, subject to certain exceptions, it would be unlawful to do so.[14] The rule thus prevents the executive committing the UK at the international level through ratification of a treaty of which Parliament disapproves. It is in addition to the dualist requirement that an Act of Parliament is necessary to give effect in domestic law to matters embodied in such an agreement. The two operate as 'constitutional belt and braces', the former ensuring that Parliament has voice before the executive commits the country on the international plane, the latter preventing the executive making binding rules at national level independent of the legislature.

18) Thirdly, there is a further twist to the rules on ratification as they pertain to the EU. It is difficult to unravel, but potentially significant. The 2010 legislation contained exceptions to the rules concerning ratification. It is clear from the explanatory memorandum that these were justified because parliamentary scrutiny was manifest in other ways.[15] Section 23(1)(b) of the 2010 legislation as initially enacted provided that the rules on ratification did not apply to a treaty covered by section 5 of the European Union (Amendment) Act 2008. This was because the 2008 legislation demanded greater involvement from Parliament, viz an Act of Parliament was required for any amendment to the EU Treaties that took effect through Article 48(2)-(5) TEU. Section 23(1)(c) of the Constitutional Reform and Governance Act 2010 was then amended so

[13] The definition of treaty includes an agreement between the UK and an international organization, Constitutional Reform and Governance Act 2010, s. 25(1).

[14] The House of Lords can also so resolve, but if does so and the House of Commons does not, then the HL resolution can be overridden by the minister, Constitutional Reform and Governance Act 2010, s. 20(7)-(8).

[15] Constitutional Reform and Governance Act 2010, Explanatory Memorandum, para. 144.

that it now provides that the requirements of section 20 concerning ratification do not apply to a treaty that is subject to a requirement imposed by Part I of the European Union Act 2011. The 2011 Act stipulates that an Act of Parliament plus a referendum must be secured prior to any ratification by the UK of a treaty that amends or replaces the TEU or TFEU.[16] The principle is clear: the default position is that ratification requires parliamentary approval, except where some greater parliamentary involvement through statute is felt necessary, this being so in the context of changes to the EU Treaty which must be approved through an Act of Parliament. Viewed from this perspective the European Union Act 2011 was simply updating this principle so as to render change to the EU Treaties subject to the requirements of Part I of that legislation, which happen to include a referendum as well as an Act of Parliament.

19) Fourthly, it could then be argued that a withdrawal agreement made pursuant to Article 50 TEU would have to be approved by Act of Parliament and subject to a referendum because it would constitute a replacement of the EU Treaties and hence come within Part I of the 2011 Act. It might be argued by way of response that a withdrawal agreement does not constitute for these purposes either an amendment or a replacement of the EU Treaties, and thus these conditions are not applicable. It would moreover be open to Parliament to displace the requirements of the 2011 Act in this instant case if it wished to do so, but that would require a statute.

20) Fifthly, if the 2011 Act is distinguished in this manner, the principle underlying the 2010 legislation still remains. The default position is that treaty ratification requires parliamentary approval through the process set out therein; there are exceptions to this

[16] For a different argument that draws on the 2011 Act, see Pavlos Eleftheriadis, 'A New Referendum is a Constitutional Requirement', July 4 2016, https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/new-referendum-constitutional-requirement.

process where greater parliamentary involvement is required; and it thus follows that if the exception does not apply it is all the more important not to forget the default rule. This is directly relevant here.

21) Consider the situation where no withdrawal agreement is secured within two years, the UK does not rethink exit, and the treaties simply cease to apply because the other Member States are unwilling to agree an extension. In this situation both parts of the 'constitutional belt and braces' whereby Parliament is given voice are undermined. There is no treaty concluded between the UK and the EU, and therefore nothing on which the 2010 Act can bite. Parliament would be deprived of voice as to whether to disapprove ratification of a new treaty because no such treaty would exist. The other dimension of parliamentary voice would also be 'muted'. The repeal of the ECA 1972 would still have to be done through an Act of Parliament, and in that sense legislative choice would be preserved, but it would be purely formal, since the UK would no longer be party to the treaties to which the ECA 1972 gave effect.

22) The 'constitutional belt and braces' provided by standard UK doctrine would also be placed in jeopardy where there is a withdrawal agreement that is closer to the thin end of the spectrum. The reason is not hard to divine. It will be more difficult for Parliament to exercise its statutory power in relation to ratification if the withdrawal agreement is relatively thin, with much left to be decided through a subsequent treaty, the details of which will not be available when Parliament makes the salient choice as to whether to object to the ratification. Real legislative choice as to whether to accept repeal of the ECA 1972 would be equally difficult, since this decision would be made in circumstances where the nature of any future relationship between the UK and the EU would be very unclear.

23) A strong argument to the following effect can therefore be made. The Constitutional Reform and Governance Act 2010 is a constitutional statute, and thus in accordance with the principles laid down by the Supreme Court in *HS2*[17] it should be read such that it can only be repealed or disapplied where this is made expressly clear, or by way of necessary implication. Legal provisions that can impact on the principle in the 2010 legislation should be interpreted accordingly. Viewed from this perspective the executive should not legally be able to allow the two year period to run out, with the consequence that the treaties cease to be applicable to the UK henceforth, without a fully informed parliamentary debate concerning the state of the negotiations, in which views could be expressed as to whether to proceed with exit in this manner, to accept the best withdrawal deal that is on offer or to remain within the EU. This would be giving effect to the legal principle contained in the Constitutional Reform and Governance Act 2010 as it pertains to this situation, and it should be regarded as a cognizable legal constraint that could be actionable in the courts. Where a withdrawal agreement is secured then the 2010 legislation will perforce lock on, but the government should give assurances that there should be a fully informed debate of the kind set out above, justified by the importance of the issue, and not merely the bare opportunity for Parliament to object to the draft agreement.

[17] *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.