Update July 2016

EU Referendum, Brexit, Article 50

What happened?

On 23rd June 2016 the United Kingdom and Gibraltar (UK) voted in a referendum on the UK’s membership of the European Union (EU). The result of the Referendum was that the UK would leave the EU (52%:48%). Although the referendum conclusively answered one question – should the UK leave the EU, or remain in the EU? – it has generated an incredible number of questions of constitutional significance, almost all of which remain unresolved.

The reason why these questions are hard to answer, and a glance across the leading constitutional law blogs reveals that public lawyers are split on most of the substantive points, is the unprecedented nature of the situation.

In what follows I will outline the key questions that have been raised and some of the responses to them. It should go without saying that, in view of the profound disagreement amongst lawyers, politicians, and the general public, there is little coalescence around particular solutions to these key questions at present, and the views summarised below are only a portion of the significant amount of material generated by constitutional commentators.

Article 50

Before proceeding any further, it is necessary to outline Article 50 of the Treaty of the European Union (TEU) – this is the legal instrument that enables a Member State to secede (leave) the European Union.¹ The Article is procedural in nature. It sets out the steps that need to be taken for a Member State to leave the EU, including a simple timetable, but it does not add any substantive conditions to the process (e.g. nature of trade relations after withdrawal), which must implicitly form part of the negotiation process surrounding withdrawal.

A Member State has two years from the date of notification of withdrawal to conclude negotiations with the EU. This period can be extended, but only by the joint agreement between the Member State and the Council. The agreement itself will be negotiated by the Council (see Art.50(2) TEU, which refers to Art.218(3) Treaty on the Functioning of the European Union (TFEU)²) must be agreed by the Council by a qualified majority (72% of the Member States, and at least 65% of the population³), following the consent of the European Parliament.

From the date of withdrawal, or after the end of the agreed negotiating period, all EU treaties, protocols and the laws and regulations flowing from them, cease to apply (Art.50(3) TEU) (except where the Member State has passed legislation that would require repeal at a national level).

Much of the focus of the debate around Art.50 has centred has related to the first sentence of Art 50(2):

‘A Member State which decides to withdraw shall notify the European Council of its intention [to withdraw from the European Union]. …’

What exactly constitutes ‘notification’ and when is it deemed to have been given, were the initial focus of concern following the Referendum result, and while this is still true, the discussion has shifted to who can make the notification. The constitutional position, that is, with whom the authority to make a notification lies, is unclear – should it be made by

1. The Prime Minister alone to the European Council
2. Government, through an exercise of the prerogative power (e.g. Order in Council), or existing statutory power, or, notwithstanding these options, following a general election
3. Following new primary legislation from Parliament that explicitly grants a power to notify

Which of these is the legally correct course of action depends on exactly what the ‘constitutional requirements’ (Art 50(1)) for the UK to secede are. There is currently no agreement.

Who can trigger Article 50?

This section summarises the arguments made in favour of the three broad positions outlined above. For more detailed discussion it is recommended that you follow the references and read the arguments made in full.

Regardless of whether the notification itself should come from the Prime Minister, Parliament or the Government, Elliott is clear that it must come from the United Kingdom, rather than the EU. He also argues that the United Kingdom must deliberately intend to make a notification under Art.50 rather than simply providing information about, for example, the referendum outcome. Elliott says, correctly, that the outcome of the referendum and the decision to notify are two different things, and so should not be confused. Young agrees because, she observes, unlike previous referenda, the legislation providing the legal basis for the EU Referendum did not specify legal consequences flowing from a given decision. As such, she concludes that the Referendum result cannot, in and of itself, trigger Article 50, and so must only be advisory.

1. The Prime Minister should notify

Elliott argues that it is for the Prime Minister to make the notification and disagrees with arguments that suggest any exercise of the prerogative power by the Prime Minister would be unlawful because primary legislation exists that trumps the prerogative (e.g. the European Communities Act 1972). He has formed this view because, although both the use of the use of the prerogative and the 1972 Act concern European law, they do not concern the same aspects of the interaction between domestic,

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5 M. Elliott, 30.06.2016, n.4 above.
European, and international law. In consequence, he also disagrees with the contention that primary legislation is needed to implement Art.50, this is, as we shall see, a point of significant divergence amongst constitutional theorists. Notwithstanding his legal argument, Elliott is clear that it would be wise, normatively speaking, to involve Parliament in the decision-making process, given the wide-ranging implications any action will have.

2. **Government should notify**

Whereas Elliott argues specifically about the legal capacity of the Prime Minister to make the notification, Gardner speaks in broader terms about the Government, anticipating that ‘the government can just go ahead and do it.’ Like Elliott, he disagrees with the argument advanced by Barber, Hickman, and King (see below), that Parliament must be involved. Unlike Elliott, he does not express the view that it would be prudent to engage with Parliament.

Other arguments that support the idea that the power to notify vests in the Government nonetheless seek to involve Parliament (recall that Elliott sees the political sense in involving Parliament). Young and Laws both advance variants of this argument based of different understandings of the ‘constitutional requirements’ provision of Art.50(1). Young argues that it might be possible to infer a convention of requiring parliamentary deliberation over secession from the EU via the convention that Parliament will be consulted before the deployment of military forces, because of the similarities between the two actions. This argument is not the same as saying legislation from Parliament is required, the power still rests with the Government, but it adds layers to the relevant constitutional procedure to be followed under Art.50(1).

Laws argues that, in addition to more closely complying with the expectations of political constitutionalism, Parliamentary deliberation prior to governmental notification would avoid many of the practical challenges posed by the fixed time limit in Article 50.

The argument that Parliament needs to be involved is taken a step further by Tucker. He argues that while the Government has the power to notify under s.2(2)(a) of the European Communities Act 1972 (the implementation or enabling of ‘rights enjoyed or to be enjoyed’), it must do this via secondary legislation. Secondary legislation is subject to scrutiny by Parliament. On this view, while

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7 M. Elliott, 30.06.2016, n.4 above
8 M. Elliott, 30.06.2016, n.4 above
10 M. Elliott, 30.06.2016, n.4 above
12 C. Gardner, 27.06.2016, n.9 above
13 M. Elliott, 30.06.2016, n.4 above
14 A. Young, 01.07.2016, n.6 above
17 S. Laws, 18.06.2016, above n.15
Parliament must have the final word to comply with the UK’s constitutional requirements, the power to take the legal steps necessary to notify rest, in the first place, with the Government. 18

A similar argument advanced by Gordon suggests that an early general election would permit the Government to secure a mandate on the basis of a set of manifesto commitments relating to the negotiations. On the basis of this set of commitments, the Government could then pass the requisite legislation and be held to account by Parliament. Again, the Government retains the initiative as regards notification, but Parliament is involved through scrutiny of the Government’s implementation of its manifesto. 19

3. Parliament should legislate in order to permit notification

Others argue that express parliamentary action is needed, rather than mere deliberation. Barber, Hickman and King reason that, 20 because all EU legal rights and obligations flow, in the UK, from the European Communities Act 1972, any action taken without the express authority of Parliament (such as the use of the prerogative power by the Government to make a notification under Art.50) would be unlawful, because it would manifestly contradict the stated will of Parliament, and therefore parliamentary sovereignty. 21 They also advance the argument that, because we live in a parliamentary democracy, actions that lead to fundamental changes in the constitutional arrangements of the United Kingdom should be initiated by Parliament.22

They make a strong argument based on the Case of Proclamations (1610) 12 Co. Rep. 74 and ex parte Fire Brigades Union [1995] 2 AC 513. They quote from this latter case as follows:

“...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…” per Lord Browne-Wilkinson, at p.552

From this well-known statement they reason that, were the Prime Minister, or the Government to issue a notification under Art.50 using the prerogative power or secondary legislation, they would be acting contrary to the clearly stated will of Parliament in the 1972 Act. The solution, they argue, is for Parliament to pass a statute that empowers the Prime Minister to make a notification.

The only point of concern that might be raised, and which seems to contradict the earlier statement in favour of parliamentary democracy, is the expectation that such an enabling provision would ‘[empower] the Government to make such changes to statutes as are necessary to bring about our exit from the European Union.’ 23 It seems that this opens up another interpretation problem as to what constitutes a necessary change. It has a strong echo of Henry VIII clauses (clauses in primary

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legislation that permit the text of that legislation to be amended by secondary legislation), which, when couched in such broad terms, are not in themselves conducive to parliamentary democracy.

Further discussion on the involvement of Parliament is available.  

**Summary of Who Can Trigger Article 50**

What is abundantly clear, therefore, is that there is no firm agreement as to who should trigger Article 50 as a matter of law. Though many confident arguments have been made in favour of governmental and parliamentary notification, they rely on particular interpretations of existing precedent and practice, such that the unprecedented nature of the situation does undermine their strength. It is likely that the only way forward will be for some political consensus to be reached on the correct way to proceed, whatever the correct interpretation of the law may be. Whether this will require the formal agreement of Parliament via statute, or simply discussion between the legislature and government, is unclear. It is in the nature of public law that there is interaction between law and politics, it being the law that regulates political and governmental activity, and so we should not be surprised that unprecedented constitutional questions cannot be resolved solely by law or politics.

**Other Questions in relation to Article 50**

Aside from the argument around who has the power to issue a notification under Article 50, there are some important ancillary questions to consider.

**What happens if the negotiation time period runs out and Parliament has not taken action to implement an agreement?**

It is clear that if the negotiation clock runs out, negotiation ceases without agreement, but this question assumes that an agreement has been reached. Stephen Laws has highlighted the ‘chaos’ that would ensue if, regardless of the content of any negotiation, the negotiation clock runs out without Parliament having passed legislation that could come into force immediately when the negotiation period ends, or agreement is reached. He notes that the solution is not as simple as disapplying, or continuing to apply all EU legal provisions. Depending on the terms of the negotiation, and whether there is an analogue for any EU legal provisions in domestic legislation, will necessitate more of a cases-by-case approach. A temporary option is a ‘transitory patch’, but this cannot account for the specific details of any exit negotiation.

This is a separate question to enabling Government to negotiate, or accepting that it already has the power to negotiate. The proposition does have echoes of Barber, Hickman and King’s argument in favour of giving the Government powers ‘to make such changes to statutes as are necessary’, but as noted above, there are some problems with this.

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25 S. Laws, 18.06.2016, above n.15
26 S. Laws, 18.06.2016, above n.15
27 N. Barber et al. 27.06.2016, above n.11
Can we decide to withdraw our Art.50 notification?

Does Art.50 provide an implicit right for the initiating Member State (i.e. the UK) to unilaterally withdraw their notification to secede from the EU? It has been argued that one can imply a right to unilaterally withdraw a notification under the established principles of international law. However, it has also been said that, because Art.50(3) provides that ‘unless the European Council, in agreement with the Member State concerned, unanimously decides to extend [the negation] period’, there can be no implicit right to unilaterally withdraw because Art.50(3) ‘expressly addresses possible limits on the cessation of the EU treaties.’

Can we decide never to notify under Art.50? Is the referendum result binding?

Nehushtan argues that it is legally incorrect to argue that the referendum result is legally binding. He refers to the Parliamentary Voting System and Constituencies Act 2011 (see s.8) which provided the legal basis for the Alternative Vote Referendum. This Act provided a legal requirement for the Government to implement the outcome of the Referendum (either to retain the status quo, or to amend the law governing voting), equivalent provisions are not contained in the European Union Referendum Act 2015; ergo, the Referendum is not binding.

On a related note, Young has raised the spectre of enforcement action under the TFEU (Arts.258 and 259). The failure to notify, while simultaneously not declaring that there will never be a notification, would lead to a state of limbo which the EU would find intolerable. Young explains that, because Arts. 258 and 259 permit the European Council and individual Member States respectively to take enforcement action against a Member State which has not met its obligations under the Treaties, the UK could be subject to enforcement action (if the UK does not notify it will remain a Member State). Thus, failure to notify ‘within a reasonable timeframe’ could cause significant problems unless the UK can point to a constitutional requirement that causes unavoidable, but reasonable, delay. Young argues that ‘the easiest’ requirement that would meet this standard ‘is a constitutional convention of parliamentary deliberation.’

There will also be profound political pressure on politicians to reach a decision on a) how to notify, and b) when to notify. The continued absence of notification, assuming the public mood remains the same, could prove problematic because ‘the result of the referendum will be effectively ignored’, which would, as things stand, be intolerable.

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32 A. Young, 01.07.2016, n.6 above; a similar argument based on breach of international law under the Vienna Convention on the Law of Treaties is outlined by Carl Gardner, see C. Gardner, 27.06.2016, n.9 above
Further discussion on the nature of the referendum is available.\(^{34}\)

**Can we negotiate without notification under Art.50?**

This is a slightly different question to that above, it assumes an underlying intention to notify, but a wariness of the count-down timer which begins after notification. The problem here is the location of power in any negotiation. In the absence of a notification, power resides with the UK, in as much as non-Art.50 secession negotiations are not subject to a time limit. With notification, the power lies with the European Union, because as time runs out, so the argument goes, there will be mounting pressure for the UK to concede on outstanding points of disagreement and reach an accord in some form before the deadline. This is the view of Carl Gardener who astutely observes that ‘you can’t actually force anyone to bargain with you’, you can only legally compel them to do so via Art.50.\(^{35}\)

The only proviso to attach to this point of view is that it assumes that the EU would rather have no agreement, than an agreement with which it is not entirely happy. The view taken by the Council will be dependent on whether the agreement under consideration will be approved by the Member States’ representatives on the Council, and the European Parliament, and whether unanimously or by qualified majority.

**Should the courts be involved in Art.50 notification debates? The Dos Santos, Mishcon De Reya,\(^{36}\) and Bindmans cases.**

Although all of these cases are pending before the Courts (Dos Santos having had a permission hearing on 19\(^{37}\) July 2016) there are good reasons, as David Allen Green notes, that the courts will not want to be involved in this decision. The main reason is that this is a political issue. As Green writes ‘judges would love to discuss this case in a seminar or at their bench table. But they will not want to decide this one in court unless they have to.’\(^{37}\) Similarly, the Government will be keen to avoid allowing the courts to set precedent relating to the use of the prerogative, because it is ‘a valuable tool for the executive.’\(^{38}\)

This argument is compelling, and it is in accordance with the Judiciary’s historical preference for avoiding involvement in matters of high policy and politics, although Smith’s views make for interesting reading.\(^{39}\)

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\(^{35}\) C. Gardner, 27.06.2016, n.9 above

\(^{36}\) The Mishcon de Reya press release on this case, ‘Article 50 process on Brexit faces legal challenge to ensure parliamentary involvement’ can be found here: [http://bit.ly/29gPK1s](http://bit.ly/29gPK1s)


\(^{38}\) D. A. Green, 11.07.2016, above n.34

David Allen Green has also outlined what is currently known about the *Mischon de Reya* and *Dos Santos* actions, and provided a link to discussion on the Bindmans claim on the *Waiting for Godot* blog.


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41 D. A. Green, 11.07.2016, above n.34
References and Resources

It was not possible to deal with all of the questions raised in relation to exit of the United Kingdom from the European Union in this update. At the current time there are no academic publications that grapple with the aftermath of the EU Referendum that could provide answers to these questions. However, there are a number of excellent blog posts which offer preliminary attempts at dealing with a range of constitutional issues that will need to be considered in detail over the coming years.

The following blogs are all currently offering regular, reliable commentary on the developing views on the correct understanding of the law in this area:


*Public Law for Everyone* [https://publiclawforeveryone.com/tag/brexit/](https://publiclawforeveryone.com/tag/brexit/)

*UK Constitutional Law Association Blog* [https://ukconstitutionallaw.org/blog/](https://ukconstitutionallaw.org/blog/)

All links last accessed 28.07.2016


