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Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum

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This article confronts the controversies surrounding Article 50 by analysing the relationship between statute and prerogative in the UK. The piece focuses on domestic constitutional issues and suggests a new way of classifying the relationship between statute and prerogative into two types falling under 'the abeyance principle' or 'the frustration principle'. The abeyance principle means that where statute and prerogative overlap, the prerogative goes into abeyance. The frustration principle means that where statute and prerogative give rise to potential inconsistencies, but do not overlap, the prerogative cannot be used inconsistently with the intention of parliament as expressed in the relevant legislation. It then argues that Article 50 has the status of primary or 'primary-equivalent' legislation which could justify applying the abeyance principle. This would mean that the trigger power would be exercised on statutory authority rather than through prerogative powers. If the courts are unable thus to construe the relevant legislation it argues EU law requires the courts to bridge the gap. Alternatively, if the abeyance principle is not applicable, it argues the frustration principle could apply but the circumstances in this litigation fall outside it. In the further alternative, EU law could require the frustration principle itself to be set aside in this case.

The decision on 23 June 2016 by the United Kingdom to leave the European Union sent political shock waves across the continent and the rest of the world. In the wake of the referendum result, a great deal of attention in domestic political discourse was suddenly focused on Article 50 of the Lisbon Treaty which sets out how a country can exit the EU.[1] Following indications by the Secretary of State for Exiting the European Union, David Davis, the Prime Minister made clear on 20 July 2016 that Article 50 will not be triggered before 1 January 2017.[2] In the midst of these seismic political developments, a new and urgent question about the source of the Government's power to trigger Article 50 was raised and resulted in a number of legal actions being commenced. The applicants in the litigation seek a declaration that it would be unlawful for the Crown to trigger Article 50 without fresh legislation authorising such action.

In a packed court in the RCJ on 19 July - so packed that the hearing was transferred to a bigger court next door - Lord Justice Leveson PBQD gave permission at a rolled-up hearing for judicial review to be brought, led by Lord

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1 http://www.bbc.co.uk/news/world-europe-36632579. Last accessed 30 September 2016.
2 http://www.bbc.co.uk/news/uk-politics-36841066. Last accessed 30 September 2016.

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Pannick QC.[3] Gazing down at the seven QCs on the front row, the judge said that the Lord Chief Justice will hear the substantive application in mid-October with the possibility of a 'leap-frog' to the Supreme Court in December and judgment by the end of the year. This timetable was designed expressly to avoid any legal interference with the political timetable laid down by the Prime Minister. LJ Leveson made clear that the courts would not countenance any delay to the political process from the litigation timetable itself.

The political importance of the outcome of this litigation cannot be overstated. Indeed, there were vociferous protests, demanding that the trigger be exercised forthwith, outside the RCJ on the day of the permission hearing. It is clear, however, that an immediate trigger has been ruled out. This creates the space for the courts to consider the interplay of a number of fundamental constitutional issues raised by the applicants in this matter. A crucial part of the background to this story is Article 50 itself.

The provisions of Article 50 are part of the Lisbon Treaty which came into force on 1 December 2009. They set out the parameters for a country to leave the EU. The important parts of Article 50 of the Lisbon Treaty are as follows:

Article 50

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 . . . 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 . . . 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 . . .

This article directly addresses the power to trigger Brexit under Article 50. It examines controversial questions about the legal basis of that trigger power by analysing the relationship between statute and prerogative in the UK. It argues that in a modern constitutional democracy, the preference should be for using democratically-passed laws rather than outdated prerogative powers.

To assist in this analysis, it suggests a new way of classifying the relationship between statute and prerogative into two categories which reflects the case

3 Lord Pannick QC will be representing Ms Gina Miller against the Secretary of State for Brexit, David Davis. There were a number of other litigants represented at the hearing who were invited to intervene in the lead action if they wished.

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law - cases falling under what it terms 'the abeyance principle' or cases falling under 'the frustration principle'. The abeyance principle dictates that where statute and prerogative overlap, the prerogative goes into abeyance. The frustration principle dictates that where statute and prerogative give rise to potential inconsistencies, but do not overlap, the prerogative cannot be used inconsistently with the intention of parliament as expressed in the relevant legislation. This new approach is then applied to the current debate about Article 50.

The article then argues that Article 50 has the status of 'primary-equivalent' legislation which could justify applying the abeyance principle. This would mean that the trigger power would be exercised on statutory authority rather than through outdated prerogative powers. In the event that the courts are unable to locate a statutory basis for the power to trigger, it will be argued that EU law requires the courts to develop one through robust interpretation. In the alternative, if the abeyance principle is not applicable, it will be argued that this case falls outside the frustration principle. In the further alternative, this article argues that EU law could require the frustration principle itself to be set aside in this case.

In summary, the article suggests that although Article 50 requires statutory authorisation to trigger it the Government in fact already possesses a statutory power to trigger Article 50 at its discretion. In the alternative, the Government retains a prerogative power to trigger Article 50 that it can exercise at its discretion. On either view, therefore, the declaration sought in the current litigation should not be granted.

THE PRINCIPLE AT STAKE

Blackstone defined the prerogative as 'that special pre-eminence which the King hath, over and above all other persons'.[4] Dicey defined it as 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.[5] Whether one adopts Blackstone's or Dicey's definition of the prerogative, the basic relationship between prerogative and statute is long established. The leading case is *Att Gen* v *De Keyser's Hotel* where a hotel was requisitioned in war time, purportedly via prerogative and notwithstanding the fact that there was a statute that was intended to regulate the process.[6] It was held that where statute lays down overlapping conditions authorising an executive power to be exercised, any prerogative legal authority goes into 'abeyance' and the relevant executive power thereafter derives its legal authority from statute. As Lord Parmoor stated:

> When the power of the Executive . . . has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament.[7]

4 William Blackstone, *Commentaries on the Laws of England*, 1765-69.
5 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co, 1959, 10th edn), 424.
6 *Att Gen* v *De Keyser's Hotel* [1920] AC 508, 540 (HL).
7 *ibid*, 575.

This is a succinct summary of the 'abeyance principle'. The Government's current position is that the power to trigger Article 50 arises purely under the prerogative. This has been defended by a number of legal commentators including Mark Elliott, Paul Craig, Carl Gardner and Gavin Phillipson.[8] Elliott claims that triggering Article 50 in accordance with the 'constitutional requirements' of the UK is a matter of Crown prerogative under the power to enter into, and logically therefore also to withdraw from, international treaties. In his view, the fact that the prerogative and the European Communities Act 1972 ('ECA') are 'concerned with distinct spheres of activity' means that 'there is no tension' between the prerogative and the ECA.

The challenge

The legal challenge to the Government's claimed ability to trigger Article 50 via prerogative is a powerful one. It was first articulated on the UK Constitutional Law Association Blog by Nick Barber, Tom Hickman and Jeff King.[9] They claim that the power of the Crown to trigger Article 50 arises as an aspect of the prerogative and that to do so would inexorably lead to various legal rights of citizens in the UK under the European Communities Act 1972 ('ECA') being rendered nugatory. Since prerogative is subordinate to statute and therefore must not undermine it - 'statute beats prerogative' as they pithily put it - they claim that fresh primary legislation is required to authorise or empower the Government to trigger Article 50. The relief sought in the litigation is a declaration that it would be unlawful for the Government to trigger Article 50 without such fresh statutory authorisation.

One of the stronger arguments put forward by Barber et al is that the purpose of the ECA can be found in the long title which is to 'make provision for the enlargement of the European Communities to include the United Kingdom'. They make the legitimate point that in determining the purpose of an Act, the long title is a 'permissible aid' to construction. They claim that 'the undoubted intention of the UK in triggering the Article 50 process would be to effect the opposite of that which the 1972 Act is designed to achieve'. They say that even if there was a 'withdrawal agreement' then 'the 1972 Act would be left as a 'dead letter' and 'indeed there would not be any need for Parliament to repeal the 1972 Act'. Further, that whatever new deal might be agreed, 'the Article 50 declaration will strip British citizens of their rights in relation to the European Parliament'. In other words, there are some rights that will inevitably

8 Elliott: https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/. Last accessed 30 September 2016. Gardner: http://www.headoflegal.com/2016/06/27/article-50-and-uk-constitutional-law. Last accessed 30 September 2016. PP Craig, 'Brexit: a drama in six acts', European Law Review [2016], 447. Phillipson, 'A dive into deep constitutional waters: Article 50, the prerogative and parliament' (2016) 79(6) MLR 1064.

9 N. Barber, T. Hickman and J. King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role', U.K. Const. L. Blog (27th June 2016) (available at: https://ukconstitutionallaw.org). Last accessed 30 September 2016. Mr Hickman is also acting as junior to Lord Pannick QC in the lead case.

be 'stripped' whatever happens after the trigger is pulled, for example the right to vote in elections to the European Parliament.

One case which supports Barber et al is *Laker Airways* v *Department of Trade* in which the Court of Appeal held that the exercise of the prerogative was unlawful.[10] The case concerned a request by the Prime Minister to the US President under the Bermuda Treaty to cancel the landing rights of Laker Airways in the USA. UK landing rights were governed by a domestic statute. The statute did not directly overlap with the prerogative power. The court said that the powers under the statute and prerogative were 'inextricably interwoven' because by preventing the landing rights in the USA, the Government in effect 'by a side wind . . . deprived [Laker] of the protection which the statute affords them'.[11] It might be claimed that the Article 50 situation is a stronger factual matrix than *Laker*. Unlike *Laker*, rights agreed internationally in the EU affect the law in the UK directly and amendments, additions, even reductions in the protections at EU level inevitably change domestic law. The effect of the withdrawal from the Treaties on some domestic rights would in many ways be more profound than what happened to Laker Airways.

Another case which provides support for Barber et al is *Fire Brigades Union ('FBU')*.[12] This case held that a minister could not fetter a duty to consider from time to time when, not whether, to implement a relevant statutory scheme. It was held he breached his duty when he stated in a White Paper that he would never bring the statutory scheme into force and instead instituted an alternative scheme under the prerogative. The crucial element of this case, which materially distinguishes it from *De Keyser's Hotel*, is that the overlapping statutory scheme itself (Criminal Justice Act 1988, ss 108–117) had not been brought into force - unlike the separate implementing provision (s 171) that *was* in force. A majority in the House of Lords held that it was unlawful for the prerogative to be used to frustrate the clearly expressed will of Parliament in s 171. Lord Browne-Wilkinson neatly summarised the 'frustration principle':

> 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.[13]

PREROGATIVE AND STATUTE - A NEW APPROACH

'The abeyance principle' and 'the frustration principle'

It is possible to reconsider the way in which the case law in this area has historically been classified. In terms of outcome, it is possible to group the case law concerning the relationship between statute and prerogative on the one

10 *Laker Airways* v *Department of Trade* [1977] QB 643.
11 *ibid*, 722 per Roskill LJ (as he then was) and 707 per Lord Denning MR.
12 *R* v *Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513.
13 *ibid*, per Lord Browne-Wilkinson.

hand into *De Keyser, Laker* and *FBU* where it was held that the prerogative could not be used due to relevant statutes being in play, and on the other hand *Northumbria Police Authority* and *Rees-Mogg* (discussed below), where it was held a prerogative could still be used notwithstanding seemingly incompatible statutes.[14]

In *Northumbria*, the minister sought to provide equipment such as batons to the police under prerogative despite a statute which required the consent of the local police board before new equipment was issued. That consent was not forthcoming. Nourse LJ arguably mistakenly distinguished *De Keyser* by arguing that the provision of CS Gas and plastic baton rounds was for the 'benefit' of citizens unlike in *De Keyser*, where property rights were taken away from citizens. The fact the prerogative was a benefit to citizens, he said, meant that the statute requiring the consent of the local police authority for the supply of riot gear did not put the prerogative into abeyance. It could be said that whether or not it was a 'benefit' to citizens, the overlap should perhaps have been treated in the same way as in *De Keyser* with the result that the prerogative authority would have gone into abeyance. The facts of the case are much closer to *De Keyser* than is commonly assumed once it is noted how much the content of the relevant norms overlaps in each case.

The importance of the new classification of *Northumbria* and *De Keyser* together by contrast with *Laker* and *FBU* is that the reclassification matches the distinction argued for earlier between the abeyance and frustration principles. Under the abeyance principle, where there are valid, in force, directly overlapping statutory provisions, the prerogative legal authority is replaced and the power is then exercised on a statutory basis–as Lord Parmoor held in *De Keyser*. The prerogative authority goes into abeyance.

By contrast, under the 'frustration principle', where a prerogative executive power persists, it cannot be used in a way which is inconsistent with any statute or frustrates its intention. The important distinction is that in the latter category, the statute in question does not actually overlap with the prerogative authority. Cases where statutes directly overlap with prerogative authority come under the abeyance principle. Cases where prerogative executive powers persist and could be used in a way inconsistent with the will of parliament come under the frustration principle. *FBU* is perhaps the paradigm case because it illustrates so precisely the distinction between overlapping and merely inconsistent statutory provisions. Since the relevant part of the statute was not in force, *FBU* fell under the frustration principle. If the Act had been fully in force, it would have fallen under the abeyance principle.

Applying this categorisation to Rees-Mogg

The case of *Rees-Mogg* is important because the facts are strikingly similar to the Article 50 scenario. Rees-Mogg sought a declaration that it would be unlawful

14 *R* v *Secretary of State for the Home Department, ex p Northumbria Police Authority* [1989] QB 26, *R* v *Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552.

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for the Crown to ratify the Maastricht Treaty. In that case, Lord Pannick QC argued that the prerogative of treaty-making in the EU context must have been curtailed by the ECA because the prerogative had been used to authorise changes in the law at EU level which affected domestic law through the ECA. The court held that there was 'insufficient ground to hold that Parliament has by implication curtailed or fettered the Crown's prerogative'.[15] The novel approach set out in this article is consistent with the reasoning behind the obviously correct outcome in this case.

What distinguishes *Rees-Mogg* from *De Keyser* is that the ECA arguably did not directly overlap with the treaty-making prerogative (this was before the Lisbon Treaty). Therefore, the abeyance principle did not apply. Instead, the frustration principle applied. EU law has a number of procedures which generate new and enforceable legal norms in the UK. The most prominent of these procedures is at the Council of the EU where ministers from member countries can approve legislation. The Treaties which allow for ministers to do this have all been endorsed by Parliament and inserted into the ECA. One of the central purposes of the ECA, therefore, is the adoption of new law in effect created using the prerogative by UK ministers at EU level.

In these circumstances, the frustration principle simply does not bite. This is because the frustration principle means it is unlawful to use the prerogative in a way which is *inconsistent* with statute. By contrast, the ECA has explicitly approved the principle that ministers can use the prerogative power of conducting foreign affairs to approve new EU law. Therefore, in *Rees-Mogg*, it was not a breach of the frustration principle to agree new law such as the Maastricht Treaty because this was envisaged and agreed to in the ECA as one of the central purposes of the Act. Lord Pannick QC was therefore incorrect to claim that the ECA 'fettered' the prerogative and the court correctly rejected that argument. A later section will build on this reading of *Rees-Mogg* to make an equivalent argument that the Article 50 trigger might *not* breach the frustration principle and therefore the claim by Barber et al that the Article 50 trigger power inevitably frustrates the intention of the ECA must similarly fail.

APPLYING THE NEW APPROACH TO ARTICLE 50

Member State, Crown and Government

Article 50(1) states what a 'Member State' may do. Article 50 does not specify which institution within any particular Member State is responsible for triggering Article 50. From the UK point of view, that function is carried out by the Executive and historically that has technically been the Crown advised by the Government.

> On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of Royal Prerogative, the validity of which cannot be challenged in municipal law.[16]

15 *ibid*, 567.
16 *JH Rayner (Mincing Lane Ltd)* v *DTI* [1990] 2 AC 418, 499 per Lord Oliver.

As this quotation illustrates, the written (but uncodified) UK constitution, which upholds the separation of powers, makes crystal clear that foreign affairs is a function which is carried out by the Executive both historically and in the present day. Parliament could of course replace any part of the prerogative with a statute but it would inevitably have to delegate the execution of the relevant power as a matter of domestic law to the Executive. Parliament cannot itself sign a treaty. Who would actually sign it on Parliament's behalf? As the court held in *Rees-Mogg*, 'to talk of parliamentary ratification of a treaty is, as the textbooks point out, a constitutional solecism'.[17] Foreign affairs is therefore by definition carried out by the Executive and of course Government ministers now exercise the power to conduct foreign affairs rather than the Crown itself.

Incidentally, not only do the Government and its legal advisers think that foreign affairs are conducted by the Crown but so do the applicants in this case. Barber et al argue that Crown prerogative cannot be used to undermine statute which presupposes that they believe the power is currently held by the Crown. Elliott makes clear his view that the conduct of foreign affairs is by the Crown.[18] It is true that from an international perspective, Member State refers to the country as a whole but Article 50 specifically refers questions of definition back to domestic law so even in the EU context, the relevant institution for legal purposes is the Executive not Parliament. In those circumstances, this article will generally refer to the Executive because, for the purposes of domestic constitutional law, the Executive is the relevant institution, not 'Member State' or Parliament.

A simple, but mistaken, approach

It might be thought that determining the question of whether Article 50 puts the prerogative into abeyance is quite simple. Article 50 is part of the Lisbon Treaty which was approved in the UK by the European Union (Amendment) Act 2008 ('the 2008 Act'). Logically, therefore, it could be thought that Article 50 is primary legislation and must immediately put the prerogative into abeyance. Unfortunately, it is not that simple. The Lisbon Treaty was indeed approved by the 2008 Parliament. Nowhere in the 2008 Act does it say that the Treaty 'is incorporated into UK law', 'has the force of law' or such-like. Instead, the 2008 Act simply adds the Lisbon Treaty to the list of Treaties in s 1 ECA. It would seem therefore that we must look to the ECA to ascertain the legal status of Article 50, although there is an alternative possible argument using the 2008 Act that is canvassed later in this section.

The ECA does not explicitly incorporate the Treaties either. Instead, as discussed later, it provides a gateway for the enforcement of any *rights* created in EU law. This is not the same thing at all. If EU law was incorporated as primary legislation, it would be possible to rely on all EU law directly in the

17 *Rees-Mogg*, n 14, above 567. Although ss 20-25 of the Constitutional Reform and Governance Act 2010 now require Parliament to approve the ratification of treaties.

18 Elliott, n 8 above.

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UK - which you cannot. So, for example, Article 15 of the Lisbon Treaty states that the President of the European Council shall be chosen using a 'Qualified Majority' voting procedure that has no impact on UK law and is therefore not incorporated.[19] Of course, there are examples of EU law, such as some Directives, that are explicitly incorporated into UK law via statute – although technically it is the statute that is the source of the right to sue in those circumstances, not the Directive. European Regulations are drafted to look like legislation but as a matter of *domestic* law, they also simply create enforceable rights through the ECA.

In the event of erroneous incorporation - of a Directive for example - it is the *rights* created by the Directive which can lead to amendment under the aegis of the ECA, rather than the Directive itself. The issue of the status of EU law has never had to be finally determined in UK law because it has never mattered before. It does matter here. The power of the ECA meant that it made no difference if EU law was primary law itself or whether the ECA just enforced rights acquired from the EU. The outcome was always the same. In this case, however, the status of Article 50 actually matters because if it is primary legislation then the abeyance principle may apply. If it is not, then we must look to the frustration principle because the abeyance principle only applies where there is valid, overlapping, in force primary legislation. A later section therefore specifically addresses the technical legal status of Article 50 in UK law.

A more complex, but more accurate, analysis

In order to determine whether triggering Article 50 requires fresh legislation, four stages are necessary. First, there is a difficult question as to the test for the relevance of EU law in national law from an EU legal perspective. Not all EU law affects national law, as discussed already. We must therefore consider the relevant tests in EU law, which are somewhat contested. If Article 50, as part of EU law, does not satisfy the relevant tests for whether it affects domestic law, the abeyance principle and the frustration principle cannot come into play. Secondly, it must be determined that the content of the prerogative and Article 50 potentially intersect so as to bring the current scenario within the relevant tests from the first stage. Thirdly, it must be determined whether there are applicable, in force, UK statutory provisions that bring the abeyance principle into play. At this stage, similar questions to the first stage are considered, but this time from the domestic UK legal perspective. If the abeyance principle does not apply, then finally it is necessary to consider whether the frustration principle applies in domestic law (see the final section of this article for the fourth stage).

First stage – does EU law apply in domestic law in this area?

The first important issue in determining the effect of EU law in this area is to decide whether Article 50 affects national law. Gavin Phillipson argues, in this

19 Article 15(5) of the Lisbon Treaty.

issue of the MLR, that it does not. He claims that Article 50 'carefully excludes from its own terms the separate question of which state organ may trigger its operation'.[20] Phillipson persuasively argues that as different countries have different answers to that question, Article 50 has no effect on which institution is responsible in each country. For the UK, the responsible state body is the Executive in domestic law, as argued above. Phillipson goes further, however, in suggesting that Article 50 not only excludes the 'who', but also the 'how' and this article disagrees with him on this point. It is suggested that the terms of Article 50 do indeed affect the 'how' in domestic law in a number of ways, considered in stages two and three. We must now consider the tests for whether Article 50 impacts on UK law, which are not entirely clear.

The classic test in EU law for whether a provision affects domestic law is whether the relevant legislation has 'direct effect'. The test historically was whether a 'clear, precise and unconditional' right had been generated which can be invoked in a national court.[21] Robert Schutze argues this test should be inverted.

> The simple test is this: a provision has direct effect when it is capable of being applied by a national court. Importantly, direct effect does not depend on a European norm granting a subjective right; but on the contrary, the subjective right is a result of a directly effective norm. And this is the case when the Court of Justice says it is.[22]

It is suggested that Article 50 generates norms (discussed below) binding on the Executive and enforceable in a UK court such that those norms satisfy the test for direct effect. It is clear that analysis of how the test has actually been applied suggests a wider definition than the simplistic 'classic' test. If this wider definition is accepted, it would obviously be easier to show that the Article 50 scenario falls within it. In particular, it may be useful to recall the fact that Article 50(3) *prohibits* the UK from leaving instantly.

> Today almost all Treaty *prohibitions* have direct effect – even the most general ones. Indeed in *Mangold*, the court held that an – unwritten and vague – general principle of European law could have direct effect (emphasis in the original text).[23]

Chalmers, Davies and Monti chart the consistent loosening of the requirements of direct effect in their discussion of *Defrenne* v *Sabena*, where they state that direct effect applies even when the terms were 'neither clear nor unconditional'.[24] They further explain that 'complete implementation of the [EU provision in that case] would require elaboration of further criteria'. It is suggested that the acceptance that direct effect can be satisfied even where there must be 'elaboration of further criteria' provides grounds for arguing that Article 50 may have direct effect because it could apply even though it similarly

20 Phillipson, n 8, (2016) 79(6) MLR 1064, 1068.
21 *Case 26/62 Van Gend en Loos* [1963] ECR 13.
22 R. Schutze, *European Constitutional Law*, (Cambridge: CUP, 2012), 314.
23 *ibid*
24 [1976] ECR 455.

mandates that further criteria must be satisfied through the national 'constitutional requirements'.[25]

If, however, the test for direct effect is not satisfied, then the doctrine of the 'primacy' of EU law may still be considered relevant. It states that in the event that there is a conflict between a domestic norm and an EU norm, the EU norm must prevail as a matter of primacy and in accordance with the requirement to fulfil a duty of consistent interpretation. As Lenaerts and Corthaut argue:

> Once it is determined that the norm is intended to be binding on the government, what counts is whether an objective line of conduct for the national government can be discerned from the EU norm.[26]

In their conclusion, Lenaerts and Couthart suggest:

> We submit that whenever the right sought is available in the national legal order in embryonic form, it appears possible to further develop the right through interpretation and primacy. In particular we argue that there is no need to examine whether the conditions for direct effect are fulfilled whenever the validity of a norm of national law is assessed in the light of a higher norm of EU law.[27]

It could therefore be argued that, regardless of direct effect, the domestic norm of exercising the prerogative could be seen as being a right in 'embryonic form' which should be developed 'in the light of the higher norm of EU law', i.e., Article 50. There is no need for direct effect. This matters because it is necessary that Article 50 is applicable in the UK, either on the basis that it has direct effect or because it is directly applicable and has primacy from an EU perspective, before either the abeyance principle or the frustration principle could possibly apply.

Second stage – do the prerogative and Article 50 potentially intersect in their content?

If EU law is directly applicable or directly effective in the UK from an EU perspective, the next question is whether the *content* of Article 50 and the prerogative intersect so as to fall within those tests. This is a prerequisite to applying the abeyance principle. It is suggested that Article 50 restricts what the Executive can do and the content of Article 50 overlaps with the prerogative. Article 50 limits the choices of the Executive in a number of ways. The first and most general way is that the prerogative of managing treaties, including exit,

25 D. Chalmers, Davies and G. Monti, *European Union Law*, (Cambridge: CUP, 3rd edn, 2014), 368.

26 Lenaearts and Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law', (2006) 31(3) *European Law Review* 287, 299-300.

27 Lenaearts and Corthaut, *ibid*, 315. See also Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal 'Certainty', Oxford Journal of Legal Studies, (2002) 22 *Oxford Journal of Legal Studies* 397.

is constrained in an EU context. The previous, theoretically untrammelled, domestic prerogative power to exit the EU Treaties at will is now explicitly limited simply to triggering the Article 50 process. The right to trigger the start of a long process is a pale shadow of the previous prerogative power to exit immediately, or perhaps threaten to do so or any of the other myriad aspects of exercising treaty-making powers in pursuit of the UK national interest constituted by the political judgement of different Governments at different times. This alone is a significant narrowing of the normal prerogative ability to exit in whatever way the UK might wish and therefore overlaps in content as a matter of domestic law.

In considering how much Article 50 actually constrains the Executive, it may help to consider whether a hypothetical new Government that believes in a 'hard Brexit' could in theory disregard Article 50 entirely and execute an immediate exit. It is suggested that this would be ineffective in domestic law for as long as the ECA is in force. The reason it would be ineffective is precisely because Article 50 explicitly limits the use of the domestic power to exit the EU Treaties. Bringing about the immediate end of the obligations incurred under the Treaties is incompatible with the Article 50 stipulation that the Member State (which, for the reasons provided above, means the Executive) only has the power to trigger the exit process by notifying its intention and commencing potentially protracted negotiations. The power to exit immediately is constrained. Immediate exit would also contradict the obligation in Article 50(3) for the state to 'negotiate and conclude a withdrawal agreement'. Article 50 also makes clear that a State cannot exit the Treaties without abiding by the express two year notification period, unless an agreement is reached. There is therefore considerable evidence that any putative general domestic Executive power to exit at will conflicts with Article 50 and must be 'assessed in the light of' Article 50.

Phillipson notes that Article 50(1) leaves the question of *who* makes the 'decision' to the national requirements but he points out that the 'constitutional requirements' proviso appears only in Article 50(1) and may therefore apply exclusively to the decision to withdraw, not the decision to send the notification'.[28] This is a vital distinction. If the 'constitutional requirements' proviso in Article 50(1) is construed narrowly, it makes it considerably more likely that the remaining constraints in Article 50 are not covered by it. Phillipson also proceeds to describe an attempt to ground a claim that 50(2) is therefore part of UK law as 'fanciful' because of the intent he ascribes to the drafters.[29] Of course, even if the drafters failed to see how the provision could affect domestic law, and did not actually intend it, that is strictly irrelevant. Law, and especially EU law, is littered with unintended consequences – particularly examples where the law is unexpectedly extended. This is no different.

It is therefore suggested that if it is correct to treat the notification under Article 50(2) separately to 50(1), in part because of the need to distinguish substance and procedure, and it is correct to focus on Article 50(2) rather than

28 Phillipson, n 8, (2016) 79(6) MLR 1064, 1068.
29 *ibid*.

50(1) as only the latter is covered by 'national requirements', then it is even more clear that the Article 50 trigger procedure overlaps with the domestic prerogative power. This is because it does not just 'develop' the prerogative power, but in fact the content entirely supersedes it. The only way to trigger the procedures leading to exit from the EU is for the Executive to make a formal notification under Article 50(2) as laid down in that provision and then commence the subsequent procedure as required by EU law, applied domestically. Article 50(1) explicitly leaves the 'who' to national constitutional requirements. Article 50(2) sets out the 'how' as a matter of directly effective or applicable supreme EU law which is binding on national law.

In building his argument, Phillipson also relies on the fact that Article 50 clearly changes the international rules governing the UK and the EU. He then claims that those rules 'thus have no relevance to domestic law'.[30] With respect, one could view this as a non sequitur. It is, of course, correct that Article 50 has effect at the international level, however, that effect does not exclude the possibility that constraints imposed on the UK by that framework *also* impact on domestic law. For the compelling reasons outlined above, it is submitted that it has such an impact, and this impact clearly overlaps with the prerogative.

Limitations set out in Article 50 specifically alter the power to use the prerogative as a matter of domestic law. Under the prerogative, the Executive could exit the EU Treaties immediately. According to Article 50, the Executive must wait, perhaps for two years. The content of the two alternatives directly overlaps. The previously unrestricted domestic power to exit at will must be considered in the light of the power conferred on the Executive under the higher Article 50 norm which only permits notification under Article 50(2) and the commencement of protracted further procedural steps.

It could be argued that, as a matter of domestic law, the new Article 50 process is simply a modernisation or codification of the prerogative power to exit the EU which broadens it out to become a two year process of negotiation prior to exit. In *BBC* v *Johns*, however, Diplock LJ famously said that it was '350 years and a Civil War too late for the Queen's courts to broaden the prerogative'.[31] Instead, the previous prerogative power to exit the EU has been overtaken, at the behest of parliament, by a two year notification and negotiation period.

Some might argue that the prerogative power is separate to Article 50 and would merely be used to trigger it – in a sense the prerogative would 'sit behind' Article 50 without there being any conflict. It is suggested that this would be similar to arguing that the Crown possesses a prerogative power to dissolve parliament but that prerogative power 'sits behind' the Fixed-term Parliaments Act 2011 ('FTPA') and would now be used to trigger provisions in that Act. Instead, it is suggested that the power to trigger dissolution in the FTPA is in fact an example of a statutory executive power exercised under statutory authority.

Similarly, the idea that a residual prerogative 'sits behind' the Article 50 procedure, which was approved by parliament, is equally unsustainable. Instead,

30 *ibid,* (2016) 79(6) MLR 1064, 1071.
31 *BBC* v *Johns* [1965] Ch. 32, 79.

and as explained further below, the power to notify under Article 50 derives from Article 50(2) and any putative prerogative power must be 'assessed in the light of' Article 50 because there is a direct overlap. It will be argued that the Article 50 trigger power is in fact a statutory executive power. In a modern democracy, the use of democratically approved statutory powers is arguably to be preferred to reliance on outdated medieval prerogatives. The next question is to consider the consequences of the overlap highlighted above, as a matter of domestic law.

Third stage - does the abeyance principle apply given Article 50 is directly effective or applicable and the content of Article 50 overlaps with the prerogative?

Mere overlap is not sufficient in domestic law. Overlap of the prerogative with a statutory provision that is valid and in force in domestic law is required for the abeyance principle to apply. It is necessary therefore to determine the technical legal status of Article 50 in UK law. It is important to emphasise that this stage, unlike the first stage, is dealing with the question from a domestic law point of view. The first stage showed Article 50 could affect domestic law from an EU law perspective. This stage shows how it actually impacts on UK law in practice.

In previous cases, the question of whether the relevant prerogative authority could be placed into abeyance has turned on the fact that the relevant Act was not drafted to apply abroad, as in *Laker*, or was not in force, as in *FBU*. In this case, the question is the domestic legislative status of Article 50 itself, rather than whether it is in force or valid. The resolution of this issue will determine whether the case falls under the abeyance principle or the frustration principle and is therefore of crucial importance and prevents this question from being purely formalistic or semantic.

The proposition that Article 50, as part of an international treaty, could qualify as domestic legislation may at first appear to be somewhat surprising. On the other hand, a provision of EU legislation that is contained within the highest form of EU law, (i.e. a treaty article) approved by an Act of Parliament in 2008 and inserted directly into a constitutional statute in the UK, the ECA, looks quite like legislation. If it is legislation, it ought to place the prerogative into abeyance in the event they overlap, which it is suggested they do.

The claim that Article 50 could count as 'legislation' in domestic UK law could be justified on at least three alternative grounds: (i) case law; (ii) the 2008 Act; and (iii) the ECA.

Court Of Appeal Case Law

There are a couple of examples where judges have stated what, in their judgment, is the appropriate way to consider the status of EU law.

In *Application des Gaz SA* v *Falks Veritas Ltd*, Stamp LJ said, 'a defence based on the provisions of . . . [the Treaty of Rome] is a defence in English law,

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and . . . falls, as I see it, precisely as if the terms of the Treaty were contained in an enactment of the Parliament of the United Kingdom'.[32] In *Bulmer* v *Bollinger*, Lord Denning said, after his famous remarks on the 'incoming tide', 'Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.'[33] These cases were decided very soon after the UK entry but the sentiments might be thought to be persuasive. EU law is not strictly primary legislation because it has not directly passed through both Houses and received Royal Assent. It could be said, however, that Treaty articles are 'primary-equivalent' legislation. This is because once a Treaty comes into force, the applicable provisions are immediately enforceable and equivalent to primary Acts of Parliament in UK law - according to the Court of Appeal.

If it is accepted that treaty articles should be treated as 'primary-equivalent' legislation, it could be argued that the triggering of Article 50 should be seen as falling within the abeyance principle. *De Keyser* is authority for the proposition that in the event that primary legislation and prerogative authority overlap, the latter must go into abeyance and the executive power being exercised is therefore being undertaken on a statutory basis. To apply the abeyance principle to 'primary-equivalent' legislation such as treaty articles would admittedly be an extension to the principle but an arguably justifiable one. Since applicable Treaty articles can be cited and used in domestic law to overrule common law or statutes, it is not too controversial to suggest that they should supersede prerogative authority in the event of an overlap.

European Union (Amendment) Act 2008

Another argument which could ground a claim that Article 50 is 'primary-equivalent' legislation in the UK is the very fact that the Lisbon Treaty was inserted into the ECA by the 2008 Act. In that Act, s 2 states:

> 2 Addition to list of treaties
>
> At the end of the list of treaties in section 1(2) of the European Communities Act 1972 (c. 68) add— "; and
>
> (s) the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community signed at Lisbon on 13th December 2007 . . .

It is suggested therefore that the 2008 Act may thus constitute statutory authorisation of the Lisbon Treaty, including Article 50. It could therefore be said that because the 2008 Act gives statutory authorisation to Article 50, it must be 'primary-equivalent' legislation and the prerogative authorisation for exiting the EU must go into abeyance by virtue of that Act. It follows therefore that the exercise of Article 50 would be under the aegis of the 2008 Act. This,

32 [1974] Ch. 381, 393 and 399.
33 [1974] Ch 401, 418.

then, provides further grounds for arguing that Article 50 should be treated as 'primary-equivalent' legislation.[34]

It could also be said that one of the rationales lying behind the abeyance principle is that in passing the Act and giving Royal Assent, the Crown has expressly given its consent to the contents of the Act. In those circumstances, it could be argued that the Crown has agreed explicitly to the Article 50 procedure as replacing its prerogative authority through the 2008 Act.

S 2(1) European Communities Act 1972

The previous two arguments may not be accepted because the 2008 Act simply inserted the Lisbon Treaty into the ECA via s 1(2) rather than expressly incorporating the Lisbon Treaty. As pointed out above, the ECA does not strictly enshrine Treaties as primary legislation in UK law but instead, under s 2(1) simply gives effect to a number of rights sourced in EU law.

> 2 General implementation of Treaties.
>
> (1) 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 . . .

A close examination of the phrase 'all such remedies and procedures . . . provided for under the Treaties . . . are without further enactment to be given legal effect or used in the United Kingdom' could ground a substantial argument that even if the 2008 Act fails to provide statutory authorisation for Article 50, s 2(1) ECA does so. In fact, it is difficult to avoid the conclusion that Article 50 is a relevant 'procedure' provided for by the Lisbon Treaty and should be 'given legal effect' qua legislation. It could also be argued that Article 50 contains 'restrictions' that should be 'given legal effect'. It is true that the contents of Article 50 itself have not been specifically written out in an Act which has received Royal Assent but, short of that, it is arguable that Article 50 has been given an imprimatur by s 2(1) ECA, or the 2008 Act, as 'primary-equivalent' legislation in the UK, with all the consequences which flow from that.

If that is not accepted, we must consider whether s 2(1) ECA itself could be a relevant statutory provision for the abeyance principle to apply. It is clear that treaty provisions that have come into force are directly applicable in national law.[35] Article 50 confers a right on the Executive, in accordance with UK

34 Consider also perhaps *AXA General Insurance Ltd* v *HM Lord Advocate* [2012] 1 AC 868, [14] where Lord Reed considered, without deciding, whether legislation passed by the Scottish Parliament was appropriately classified as 'secondary' legislation or primary legislation or possessed some kind of 'intermediary' status. It is could be said, therefore, that the precise definitional status of applicable legislation in the UK is not always easy to discern.

35 *Van Gend en Loos,* n 21 above.

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constitutional requirements, to trigger the exit process.[36] Furthermore, s 2(1) ECA gives direct effect to that right without the need for further enactment.

Therefore in domestic law there are two overlapping legal sources under which the Executive may exercise the right to leave the EU: the right under s 2(1) ECA which 'gives legal effect' to the right to leave set out in Article 50 and, alternatively, prerogative authority rooted in common law. This abeyance principle suggests that the Executive must exercise the Article 50 right to withdraw under the statutory authority of s 2(1) ECA and the prerogative therefore goes into abeyance. This is also consistent with the doctrine of primacy highlighted above.

One counter-argument might be that the careful parsing of the ECA and the 2008 Act above misses a much bigger point which is that something as important as exiting the EU should require crystal clear wording before it could supersede the prerogative in domestic law. The first response to this argument might be to deny the premise. Even the most poorly drafted, unclear primary or primary-equivalent statutory provision approved by a democratically-elected parliament should supersede clanking medieval prerogative authority which has no democratic legitimacy at all.

An alternative response to the counter-argument may possibly be found in another legislative provision, s 3(1) ECA.

> 3 Decisions on, and proof of, Treaties and EU instruments etc.
>
> (1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

In *Simmenthal*, the CJEU held that 'every national court must . . . apply Community law in its entirety'.[37] It is suggested, therefore, that even if the courts were to believe that the provisions cited already in this section are not sufficiently clear to justify the reading put forward in this paper so far as a matter of domestic UK statutory interpretation, the case of *Simmenthal* as well as the doctrine of primacy, under the aegis of s 3(1) ECA, require the UK courts to close the gap by engaging in robust interpretation. This could be described as 'gold-plating' the domestic provision.

It must be remembered that the applicants in this matter seek a declaration that the right to leave under Article 50 cannot be exercised lawfully by the Executive without a further explicit statutory authorisation from Parliament.

36 Elliott points out that the UK already possesses such a right in international law so the right conferred may not 'arise under or by virtue of the treaties', although he expressly leaves the point open. Regardless of the international law position, as a matter of EU law Article 50 creates a right *within the EU framework* that was not previously articulated and it is therefore arguably conferring a right within EU law under the treaties. Elliott, n 8.

37 *Case 106/77 Amministrazione delle Finance dello Stato* v *Simmenthal* [1978] ECR 629, para 21. See also *Case C-106/89 Marleasing SA* v *La Comercial Internacionale de Alimentacion SA* [1990] ECR I-4135.

This is precisely the mischief which EU case law seeks to avoid. EU law has primacy over inconsistent domestic rules, particularly any rules that delay or prevent the full application of EU law.

A further counter-argument against Barber et al might be that if triggering Article 50 was supposed to require a fresh statute as a matter of domestic constitutional law, the 2008 Act would have said so. Under s 6, the 2008 Act (later replaced by the European Union Act 2011) specifically lists actions under the Treaty which require further parliamentary approval, due to their constitutional import, before a Minister can undertake them. The 2008 and 2011 Acts addresses important constitutional questions surrounding powers being transferred between the EU and the UK. Since those Acts make no mention of any requirement for a new Act before Article 50 can be triggered, Parliament did not impose any requirement on the Government to seek legislative approval before triggering Article 50. That decision is a matter for Parliament and it might be thought invidious for the courts unilaterally to impose a requirement which Parliament chose not to impose.

There is one important domestic case which must be addressed. In *Shindler*, the Court of Appeal considered whether EU law was relevant to the domestic constitutional requirements for leaving the EU. The court held that:

> It would be contrary to [Article 50(1)] if articles of another EU Treaty relating to citizenship and free movement were to intervene so as to determine the constitutional requirements to be adopted by a Member State which is deciding whether to leave the EU.[38]

This has no relevance to this case because the issue here is the effect of the very terms which the UK agreed to be governed by in the process of deciding to leave the EU. That is quite different to an attempt to import other areas of substantive EU law into the question of what are the UK's constitutional requirements for leaving. Alternatively, *Shindler* was wrongly decided and UK nationals living abroad should have retained the right to vote in the referendum.

In summary, Article 50 is directly applicable or directly effective. It overlaps in content with the prerogative. As a matter of domestic law, it is either 'primary-equivalent' legislation or s 2(1) ECA is the source of valid statutory authority. In either case, the prerogative goes into abeyance.

THE EXERCISE OF THE STATUTORY POWER BY THE EXECUTIVE

It was suggested earlier that the existing UK national constitutional requirements mean that it is the Executive which is responsible for triggering Article 50, whatever the source of the Executive's legal authorisation might be.

The next question which must be addressed is *how* the Executive can exercise the right to trigger Article 50, if the right is indeed authorised by statute rather than by prerogative authority. Usually, a statute explicitly confers a

38 *Shindler* v *Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 419, 426.

specific statutory executive power. It is important to distinguish the statutory imposition of, say, new obligations or a fresh regulatory framework in a particular context from specific authorisation of the Executive to facilitate these changes or enforce the framework. Barber et al might point out that there is no clear statutory approval of a specific executive statutory power to trigger Article 50. Therefore, even if the general prerogative has been put into abeyance, the absence of an explicit executive statutory power in the 2008 Act might mean that such a power needs to be freshly conferred by parliament, especially given the importance of the consequences.

The robust option

The robust response to the absence of a provision specifically setting out an executive power to trigger Article 50 is simply to deny the need for such an explicit statutory provision. Unlike ordinary statutes, which spell out a statutory power conferred on a minister, the treaty-making power is already possessed by the Executive, no matter on what legal basis it is held. On this view the Executive can therefore continue to exercise the power, but now under a statutory authority not prerogative authority, in the same way as it did before (subject to any fresh limitations imposed by the statutory authorisation as set out in the previous section – for example the mandatory two year negotiating period). No further statutory explicit provisions as to the exercise of the power are necessary. This would be a direct application of the rule set out by Lord Parmoor above. The legal authority for exercising the power would simply have been transferred from prerogative to statute. The executive power under that authority would remain unchanged as a power consistently held by the Executive.

It should perhaps be pointed out that the previous paragraph slightly glosses over the fact the before the transfer, the power was held by the Crown, but statutory powers are normally conferred on ministers directly. It should be noted, however, that the Crown can possess statutory powers.[39] It is suggested that nothing turns on whether the relevant power is technically still held by the Crown, as part of the Executive and advised by ministers, or whether the power is exercised directly by ministers as part of the Executive. Although it is a minor potential wrinkle, this is perhaps why choosing this option could be described as 'robust'.

The nuanced option - s 2(1) and s 2(2) ECA

A more sophisticated answer might be to claim that a statutory power can be constructed by virtue of s 2 ECA in an analogous way to the previous section of this paper. S 2(1) ECA refers to 'All . . . *powers* . . . from time to time created or arising'. The statutory power to trigger Article 50 could be grounded in

39 See s 2(7), Fixed Term Parliament Act 2011. See also s 45 Scotland Act 1998. Both sections explicitly confer powers on the Crown, with little further specification.

s 2(1) ECA as it is necessarily 'created' or 'arises' by virtue of the Lisbon Treaty if the Executive's power to trigger Article 50 is to be immediately effective. This would mean that a minister of the Crown would be vested with the power to trigger Article 50 and that statutory power would be automatically created by s 2(1) ECA because EU treaty articles must 'without further enactment be given legal effect'.

Adam Tucker puts forward an analogous, but ultimately unpersuasive, variation on this argument based on s 2(2) ECA. He argues that s 2(2) creates a statutory authorisation for the Government to pass secondary legislation giving effect to novel rights acquired from the EU.[40] He describes the Article 50 power as such a 'novel right'. He argues that the government 'must use the statutory power contained in the 1972 Act' to create a secondary instrument authorising the trigger mechanism. Tucker's argument suffers from the difficulty that s 2(2) ECA is designed for EU law which needs further implementation, such as Directives, not for EU law which is directly effective or applicable without the need for any further enactment, such as Article 50. To insist that the Executive's right to trigger Article 50 requires fresh statutory authorisation (even using a secondary instrument) would again be to hamper the effective implementation of a directly applicable treaty article, and therefore be in breach of *Simmenthal*.[41]

Locating the necessary statutory power in s 2(1) might be thought by some critics to stretch the language of that section and that therefore authorising legislation ought to be passed explicitly to confer the power on the Executive. However, the 'gold-plating' requirement from *Simmenthal* could be said to apply, so that a statutory power to trigger must necessarily be derived from this section 'without further enactment' because it concerns a treaty article, not a directive. This statutory power would then be used instead of the executive prerogative power.

Furthermore, s 2(2) ECA also states in part:

> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

One of the objects of the EU, after Lisbon, is to allow a Member State to withdraw from it. It must be remembered that one of the reasons Article 50 was passed was to prevent a disorderly exit and it is arguably a legitimate 'object

40 (2) Subject to Schedule 2 to this Act, at any time after its passing 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 purpose 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; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

41 A. Tucker, 'Triggering Brexit: A Decision for the Government, but under Parliamentary Scrutiny', U.K. Const. L. Blog (29th Jun 2016) (available at: https://ukconstitutionallaw.org/).

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of the EU' to prevent that potential problem.[42] It is arguable in summary, therefore, that the Prime Minister is entitled to trigger Article 50 in accordance with a statutory power under s 2(1) exercised according to an object rooted in s 2(2) ECA. It could be claimed that this would not in fact contradict the ECA in the way alleged by Barber et al because an orderly exit in appropriate circumstances is included as one of the 'objects of the EU'.

THE FRUSTRATION PRINCIPLE

This section addresses what would result if, contrary to the previous discussion, the courts decide that the power to trigger Article 50 remains a prerogative power. This would require consideration of how to apply the second part of the novel bifurcation suggested in this article between the abeyance principle and the frustration principle. An earlier section sought to look afresh at *Rees-Mogg* and explain the undoubtedly correct outcome in that case using the abeyance and frustration principles. This section attempts to build on that analysis of *Rees-Mogg* to lay out an alternative way in which the Article 50 litigation could be decided.

Applying the frustration principle

The frustration principle dictates that it is not possible to use a prerogative inconsistently with the legislative intention of parliament. Barber et al argue that the purpose of the ECA is 'to make provision for the enlargement of the European Communities to include the United Kingdom'.[43] The 2008 Act, however, arguably alters that purpose. Article 50 makes provision for an orderly exit and was approved by parliament. As a matter of domestic law, parliament is entitled to amend the purpose of any Act including the ECA. It is suggested that Article 50, through the 2008 Act, adjusts the purpose of the ECA so that it includes the UK in the EU *unless the UK decides to leave*. Therefore the exercise of the prerogative would not in fact be inconsistent with the purpose of the ECA and can therefore be triggered by the Government at its discretion.

The Executive, under the frustration principle, is entitled to exercise its prerogative powers so long as such exercise is not inconsistent with the will of Parliament. The latest will of Parliament is that the UK shall be included in the EU unless the UK decides to leave and trigger Article 50. The UK has decided to leave. If the power to trigger Article 50 is a prerogative power then the decision when to trigger Article 50 rests with the Government to be exercised when it thinks it is the appropriate time to do so. There is no need for any further legislation demonstrating that it is the will of Parliament that

42 http://europa.eu/rapid/press-release_MEMO-09-531_en.htm?locale=en, Section 3(c) – 'Can a member state withdraw from the Union?' Last accessed 2 August 2016.

43 Barber et al, n 9, above.

the Executive be authorised to trigger Article 50 if the UK decides to leave. That has already happened.

Disapplying the frustration principle

In the alternative, if the previous argument is rejected, there is one final argument that the Government could make if the court were to agree that, prima facie, the frustration principle could be applicable in this case. In other words, there is one last trump card which could prevent the court from finding that it would frustrate the will of Parliament for the Government to trigger Article 50 without fresh statutory authorisation. It is based on the fundamental EU law principle that where 'any provision of a national legal system', even a constitutional one, 'might prevent, even temporarily, Community rules from having full force and effect' then 'any legislative, administrative or judicial practice' must be 'set aside'.[44]

The frustration principle is a 'provision of a national legal system' in UK law. Article 50 is a 'Community rule' that must be given 'full force and effect'. If it applies in this case, the frustration principle would prevent, temporarily, the triggering of Article 50 until fresh statutory authorisation was granted. This would mean that Article 50 would not be given 'full force and effect'. EU law is clear that in such circumstances, the domestic legal provision must be 'set aside'. It follows, therefore, that the frustration principle would have to be set aside in this case in order to give full effect to Article 50.

The courts may therefore simply set aside the frustration principle. The disapplication of the frustration principle on this occasion would have no wider effect on UK law or the use of the principle in future cases. It would only apply to the particular factual matrix of this case as a direct result of the particular requirements of EU law. In these circumstances, it would therefore be the case that the Government would be entitled to trigger Article 50, using the prerogative, and notwithstanding any inconsistency with the purpose of the ECA, to commence the two year negotiating period at its discretion.

CONCLUSION

The problem for those who argue that parliamentary approval is required to trigger Article 50 is that they are slightly caught between two stools. On the one hand, their claim simply to be defending Parliament rings slightly hollow because they ironically want to defend the idea that the power to trigger Article 50 is a, wholly undemocratic, prerogative. This is because otherwise the frustration principle simply cannot apply. On the other hand, they must avoid the court deciding that parliament has already decided, democratically, to put the prerogative into abeyance by authorising primary-equivalent legislation

44 *Case C-213/89 R* v *Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433, [20].

that granted the executive the power to trigger exit. So they seek to limit the effect of what the Parliament that they claim to defend may actually have intended to do. It is a challenging balancing act. One way or another, it seems unlikely that they will prevail.

This paper has attempted to set out a novel way to approach the relationship between prerogative and statute. It has also considered a number of alternative ways in which the courts may determine the application in this case as a matter of law. It has identified four principal ways in which a refusal of the application might occur:

A) The courts could hold, following Elliott and Phillipson, that there is no relevant conflict between the prerogative and the ECA;
B) (i) The courts could hold that Article 50 is in fact contained in primary or primary-equivalent legislation in the UK. The prerogative therefore goes into abeyance and,
(ii) The Government has the power to trigger exit under that primary-equivalent legislation because the relevant executive power continues to be possessed by the Executive on a new statutory basis grounded in s 2 ECA, perhaps 'gold-plated' by *Simmenthal*;
C) The courts could hold that triggering Article 50 would not breach the frustration principle because triggering exit would be within the adjusted purpose of the ECA as amended by the 2008 Act or
D) Alternatively, if the Crown using a prerogative to trigger Article 50 *was* found to breach the frustration principle, the frustration principle could itself be set aside in this case in order to permit the full and effective implementation of Article 50 as part of EU law.

Under any of these options, therefore, the declaration would be refused (there may of course be other grounds on which the courts may determine the matter). It is to be hoped that the courts grasp the opportunity to modernise the law surrounding prerogatives while avoiding the potential political bear trap of appearing to interfere in the political arena. Both objectives are simultaneously achievable.