

Legal challenge to Brexit threatens constitutional crisis in UK

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Three of Britain's most senior High Court judges are considering their verdict in one of the most important constitutional cases in the history of the UK.

A four-day judicial review at London's Royal Courts of Justice saw a challenge mounted against the British government over its decision to trigger Article 50 of the Lisbon Treaty—beginning the formal process leading to the UK leaving the European Union (EU)—without Parliament passing a new law on the matter.

Prime Minister Theresa May announced at the conference of the ruling Conservative Party that she will activate Article 50 by the end of next March. May's statement heightened fears within ruling circles of a "hard Brexit," in which exit from the EU would also include an end to UK access to the European Single Market. The majority of Britain's ruling class, centred on sections of finance capital that dominate the economy, are opposed to Brexit and the loss of access to the single market above all. This faction is also dominant in Westminster, encompassing almost three quarters of MPs and a majority in every major party except the Tories.

May intends to bypass Parliament by using Royal Prerogative to trigger Article 50, as it would not be possible for her to get the necessary support otherwise. Royal prerogative powers, once held by British monarchs, are wielded by government on the advice of the prime minister and the cabinet. The mechanisms by which the government is accountable to Parliament and whether Parliament has the right of veto have long been a contentious issue.

Regardless of the verdict of the judges, the court case will exacerbate the constitutional and political turmoil caused by the June 23 referendum. Whoever loses is expected to appeal to the Supreme Court.

The financial interests involved are underscored by the identity of those who initiated proceeding to bring the High Court case against the government.

A group of claimants is led by Gina Miller, a London-based investment manager for the firm SCM Private, which was launched in 2009 and manages funds of more than £100 million. Miller co-founded the firm with her husband Alan, who is known as "Mr. Hedge Fund," having amassed a personal fortune of more than £30 million in the City.

People's Challenge funds the legal case via crowd-funding that raised almost £160,000. It was set up by Grahame Pigney of the campaign, Say Yes 2 Europe. Separate crowd-funding raised more than £10,000 for legal advice from public law experts, organised by barrister Jolyon Maugham QC, who previously advised former Labour Party leader Ed Miliband on tax policy.

Miller was represented by Mishcon de Reya, a leading advocate of the finance and banking sector in London. Mishcon de Reya retained Baron David Pannick QC and Tom Hickman, a practising barrister and Reader in Public Law at University College, to act as counsel. Hickman is one of three academics, leading members of the UK Constitutional Law Association, who have drafted a legal opinion arguing that any decision to proceed without an Act of Parliament could be overturned by judicial review.

At the end of September, the claimants secured a victory, with a High Court judge ruling that the government must release its private legal arguments for not consulting Parliament on the triggering of Article 50. The documents revealed that government lawyers were to argue it is "constitutionally impermissible" for Parliament to be given a vote on the Brexit process. The "expertise of ministers and their officials are particularly well-suited and the courts ill-suited" to deal with the issue, they wrote.

Lord Pannick said the case was of "fundamental constitutional importance." If the government used its prerogative powers to trigger Article 50, this would have the "intended consequence" of depriving citizens of the

rights they have as EU citizens. British citizens were granted further, new rights after Britain joined the EU under the European Communities Act 1972, which was passed by Parliament. These included the right to stand as candidates and vote in European elections, and refer a legal case to the European Court of Justice. Pannick told the judges, “If you are going to take these rights away you need parliamentary authority. ... The basic truth is that parliament is sovereign and when rights are conferred they cannot be taken away by the executive.”

Addressing the “flexibility” of the UK’s unwritten constitution, he said, “However much flexibility there may be, a minister ... cannot validly act to remove statutory rights, rights of a constitutional nature, without we say, breaking the back of the constitution and crippling it.”

Pannick continued, “The inevitable consequence of (Article 50) notification is to destroy those rights and to destroy them whatever parliament may think about the matter.”

Barristers for the pro-EU claimants cited the Bill of Rights of 1689, which states that laws should not be discarded or suspended without consent from Parliament.

Putting the government’s argument, Attorney General Jeremy Wright, its most senior legal figure, said that some rights of UK citizens would be “hollowed out” but these were “necessary incidents of leaving a club.”

Wright argued that May could invoke Article 50 because “the country voted to leave the EU in a referendum approved by act of parliament. ... There must be no attempts to remain inside the EU, no attempts to rejoin it through the back door, and no second referendum.”

Wright said the court was not hearing “a narrow legal challenge directed to the technical procedural matter of notification. In reality, it seeks to invalidate the decision already taken to withdraw from the EU and to require that decision to be taken by parliament.”

The extraordinary political and economic volatility unleashed by the Brexit vote was nowhere more evident than in the impact of the court case proceedings. Since the June referendum, the pound has collapsed by almost 18 percent against the dollar, as the global currency markets gave their verdict on Brexit. It fell 11 percent immediately and then another 6 percent when May committed the government to triggering Article 50.

During the High Court hearing, government lawyer James Eadie QC, stated, “The government view at the moment is it is very likely that any such agreement [at the

end of the UK/EU negotiations] will be subject to [parliamentary] ratification.” Traders saw this as opening the possibility of Parliament blocking a British exit without a favourable trade deal with the EU and the pound instantly rallied 1 percent to \$1.23, its biggest gain since mid-August.

The Tories have a working majority of just 16 seats in Parliament and the Brexit crisis could see May’s fall and new elections, under conditions of escalating economic and social tensions. The pro-Brexit *Daily Mail* reported Saturday that “a rebel alliance of MPs opposed to a hard Brexit,” led by Ed Miliband and former Liberal Democrats leader and Deputy Prime Minister in the previous Tory-led coalition Nick Clegg, are to “table a motion next week demanding the right to block Brexit with a vote in Parliament if it means leaving the single market. More than 20 Tories are predicted to join the alliance.”

Plans for a pro-EU political regroupment are at the centre of the attempted coup by Labour’s Blairite wing to remove party leader Jeremy Corbyn. Corbyn campaigned for a Remain vote, but the right wing placed his “lukewarm” position on the EU alongside his stated opposition to nuclear weapons and nuclear war against Russia as the basis for their political campaign against him.

One of the main coup leaders, Hilary Benn, was elected by MPs to be chairman of the Commons Select Committee for Exiting the European Union. He defeated the pro-Leave Labourite, Kate Hoey, by 330 votes to 209. On taking the post, Benn said, “Parliament will definitely want to have the final say on the agreement that is negotiated by the Government at the end of this process whenever that comes.”



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