



# The Rule Of Law Must Be At The Centre Of Brexit

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Friday morning's reaction to the Article 50 judgment has made me deeply reflective about the state of our politics. The Brexit era has been characterised by political announcements redolent of the deepest farce from *'The Thick Of It'*. The EU Referendum has changed **everything** about British public life, and it is difficult to get a stable sense of what is actually going on as we lurch from one episodic crisis to the next.

We can see this instability everywhere; parliamentary sovereignty's greatest proponents are at odds with that principle today; parties across the political spectrum have undergone coup after coup this year; politicians of the highest seniority have actively supported [antipathy to the judiciary](#).

In anticipation of the chaos that EU withdrawal will inevitably cause, many have resorted to demagoguery and tribalism. Well-drilled representatives of soft/hard, red/blue and staunch/moderate compete in Brexit adversarialism to no clear result, bar the confusion of the electorate.

*But no more.*

These camps can end their aimless war by using the High Court judgment as a roadmap to Brexit. The strength of its analysis will allow decision-makers to navigate this unprecedented territory whilst respecting the fundamental aspects of the British constitution, with the rule of law at the centre.

Here I muse over the strengths of the judgment, its (limited) political effects, and lessons that this saga holds for our society and polity.

## **A judgment that should be upheld on appeal**

Though the Twitter-friendly and eloquent "stifling the will of the British people" is ubiquitous, it is not a responsible description of what the High Court did last Friday.

The legal blogosphere has underlined a number of times that frustration of the referendum result cannot be read from the case. Such comment is a grotesque caricature. **The merits of leaving the European Union were not examined by the court, and never will be.** The mere whiff of decision-making for political reasons was debunked in the first few paragraphs of the judgment, [available here](#). This was a question of the process by which an Article 50 notification can be given.

That process needed legal delineation. Article 50(1) TEU is almost tautological. It tells us nothing beyond the fact that a Member State leaving the EU should do so "in accordance with its own constitutional requirements." We have no written constitution to turn to, so this provision was always likely to lead to a lot of head-scratching.

The substantive question of those constitutional arrangements is whether Theresa May and her ministers, i.e. the executive, could

trigger Article 50, or if this would need to be done by Parliament. A potential consequence of the latter is, due to many MPs expressing anti-Brexit views, the blocking of withdrawal. This **political possibility** is irrelevant to the interpretation of our constitution and shall be addressed later.

The starting point for those advocating the executive's right to trigger Article 50 is its constitutional right to act on the international plane. Ministers are permitted to make treaties with other nations as part of their conventional powers under the **'royal prerogative'**. As Article 50 is a communication to the European Council, in the government's submission, the powers the executive have to give such a notification are long-established.

There are clear limits to the exercise of the royal prerogative powers, and the judges disagreed with the executive on how such limits would apply in this specific situation. Although the prerogative allows the executive to act with freedom internationally, it does not permit actions which would alter domestic law, i.e. changing the rights and obligations of British citizens. That argument was of critical value in this case, because Gina Miller's rights under EU law in this country, in other Member States, and regarding the EU itself would be removed if the executive gave such a notice.

Opponents contend that this restriction has been inconsistently applied. They point to ministers that have regularly signed up to international instruments that affect our rights in this country, noting that this has happened many times at the European Union. They say that if triggering Article 50 is outside of the powers of the executive, Blair and Thatcher were wrong in signing treaties that deepened our connection to Europe.

The difference between these "more EU" acts and the "scrap EU" act of triggering Article 50 is that Parliament expressly empowered ministers to create the former via the European Communities Act 1972, whilst also making EU law directly effective in the U.K. If the executive were able to trigger Article 50, this would make this "constitutional statute" useless, depriving it of its effects. The only thing powerful enough to do that is an Act of Parliament, and the High Court underlined this principle in this case.

The sovereignty of parliament is inviolable. That is uncontroversial. One of the characteristics that the late Lord Bingham ascribed to the rule of law is the maintenance of limits on the exercise of executive acts, ensuring that ministers act within their legal powers, and this is absolutely relevant to this case. The counterfactual situation where Gina Miller did not bring her case, or the court ruled in favour of the executive, is quite sombre.

In that scenario, the executive would have drained an important constitutional statute of its effectiveness. This would have undermined our democracy, which elects parliamentarians on the basis that they are sovereign under our constitution. Worse still, it might have permitted the executive to effect change in other combinations of international and domestic legislation, such as the link between the European Convention on Human Rights and the Human Rights Act 1998. That would have been clearly unsatisfactory for anyone that respects our legal order.

The judiciary thus performed its role in holding the executive to account excellently in this case. The points it raises about the necessity of involving Parliament in this process will ensure that the constitution is upheld throughout Brexit.

### **Brexit means Brexit**

It is important to separate the legal and the political when talking about Brexit. The above is a comment on the reasons for the Miller decision, and below I discuss its wider impact on the executive's Brexit plan.

Though many have expressed the view that the judgment has thrown May's broad timeline for withdrawal into disarray, I take a different view. We have much more clarity about the next steps for Brexit as a result of the High Court's insight. The ruling could take us down one of two possible paths; the government's appeal will either succeed or fail. If the former takes place, the Prime

Minister may trigger Article 50 as she wishes. If the latter takes place, there is a persuasive argument that Parliament need only give authorisation for the triggering of Article 50, leaving the process of negotiation with the EU to the government. Several of the options mooted, including a one-line bill, could be expedited and executed by Parliament within the course of a day.

What we **do know** is that as a matter of political destiny, **Brexit will happen** despite the best efforts of any campaigners. There is simply no precedent for Parliament rejecting the outcome of a democratic mandate on this scale. Despite Theresa May's paper-thin majority, the House of Commons will vote reluctantly, but certainly, in favour of a resolution or bill actioning Article 50 next year. The mood amongst MPs post-referendum has been deciding *how* and *when* Brexit will happen, despite reports otherwise.

It is notable that leading lights of the Remain campaign, including Vote Leave Watch founder and chairman Chuka Umunna, have not committed to voting against Brexit. MPs' minds will be focused by the electoral arithmetic of June 23rd; the vast majority of MPs represent communities that voted to leave, or themselves supported the Leave campaign. Acting in rational self-interest and self-preservation, it is highly unlikely that they would risk the political suicide of not triggering Article 50. MPs such as David Lammy and Catherine West have been vociferous in denouncing Brexit plans because their constituents' voting permits them to do so. The next election, be it in 2020 or sooner, focuses the minds of the rest of Parliament.

### **Underlining the rule of law concept**

There has never been a more pressing need for education around the rule of law, and we must foster respect for the principles that our country is built on. In the last few days, politicians have made it abundantly clear that their understanding of our peculiar constitution is scant. In dealing with the inevitable challenges that the uncharted waters of life outside the European project will pose, it is crucial that rule of law principles are foregrounded in the administration of government.

We should learn from our worst moments. The tragic death of Jo Cox this summer should have underlined the need for compassionate, issue-focused debate that questions the **politics** and not the **person**. Jumping to judges' qualifications and demographic factors, as well as accusing them of bias, instead of reading the judgment is the wrong route. Instead there should have been a concerted effort by the media to make legal arguments about the judgment.

Similarly, Nigel Farage has promised to lead a march of 100,000 through Parliament Square on one of the potential hearing dates in the appeal of this case. This is at best an irrelevance based on misunderstanding, and at its worst a perverse attempt to coerce the judiciary. The rule of law ensures that the law is supreme in resolving disputes. As Farage's idol Thatcher so eloquently put it, "the rule of law must prevail over the rule of mob."

The rule of law is a non-partisan principle that unites and bridges us across the political divide, allowing us to live in a fair and just society. Education regarding its content is essential not just for our children, but for our leaders as well. For this reason, the Bingham Centre is calling for the Lord Chancellor to give a lecture on the substance of the rule of law.

I want to live in a world where the rule of law and its principles are ubiquitous, where decision-makers think twice before cutting services because of access to justice concerns, and where the law is so clearly expressed that everyone can understand it. That, amongst other ideals, is what the rule of law safeguards.

### **What you can do**

I am currently working on a project that seeks to teach the principles of the rule of law through citizenship education. The ultimate aim is a country where every secondary school student understands the practicalities of the rule of law and how these principles relate to their lives.

Anyone can take part in the project. As it develops, there will be scope for legal practitioners and academics to contribute to

factual briefings on rule of law topics. Teachers can deliver the course in their schools using the free resources that we have created. It could even be taught in non-traditional educational environments such as youth clubs. As it grows, flexible opportunities for involvement will develop. All willing volunteers will be given meaningful roles.

If you are interested in taking part, contact me at [schools@binghamcentre.biicl.org](mailto:schools@binghamcentre.biicl.org), become one of the project's first followers on Twitter, [@BinghamSchools](https://twitter.com/BinghamSchools) and together we'll build the next generation of critical citizens who know of, and can use, their legal rights in a free and fair society.

URL: <https://binghamcentre.biicl.org/comments/56/the-rule-of-law-must-be-at-the-centre-of-brexit>