FAR FROM CALM WATERS
A Prime Minister's Resolve and a Citizen's Day in Court

They say that one cannot have one's cake and eat it – a rather well-known adage which the proponents of the United Kingdom's withdrawal from the European Union were determined to disprove. Besides promising major financial savings (especially in the National Health Service's budget) to voters in the 23 June 2016 Brexit referendum, they also sketched a vague vision of a buccaneering United Kingdom trading with the entire world, including its European neighbours, at the most preferential terms and with a dynamic economy to boot.

What does the Prime Minister think?
Alas, the reality is a different one: Two weeks ago, after having delivered a barnstormer of a speech at the annual Conservative Party conference, Prime Minister Theresa May now has to contend with the diminishing prospect of a post-Brexit Britain with access to the European Single Market. European Council president Donald Tusk has essentially foreclosed the "soft Brexit" option (access to the EEA and the Single Market, few to no restrictions on immigration from the EU and requirements to follow/continue to implement major parts of EU law), as Prime Minister May's government has (in line with the message apparently sent by Leave voters in England's deindustrialized north) placed a prime emphasis on strict immigration controls, as demonstrated by the following passage in her conference speech:

"We are not leaving the European Union *only to give up control of immigration all over again*. And we are not leaving *only to return to the jurisdiction of the European Court of Justice*. That's not going to happen. We are leaving to become, once more, a fully sovereign and independent country – and the deal is going to have to work for Britain." [emphasis added]

Taking into account the Prime Minister's emphatic denunciation of two central pillars of European Union law, namely the free movement of people and the primacy of European law over national (constitutional) law, it is quite clear that a deal keeping the United Kingdom within the European Economic Area is moving ever further from Britain's reach. Conversely, a "hard Brexit" (no EEA and Single Market membership, full immigration controls, no requirement to follow EU law at all) has been rendered more plausible.

What about the European Union's posture on Brexit?
Besides Tusk, several key players are aligning against a lenient approach towards the United Kingdom: Among them are European Commission President Jean-Claude Juncker, the Commission's recently chosen Brexit chief negotiator Michel Barnier and the newly appointed European Parliament Brexit representative, former Belgian Prime Minister Guy Verhofstadt. In 2017, major elections will take place in France (President), Germany (Bundestag) and the Netherlands (Second Chamber). In addition, in December 2016, the outcome of a constitutional reform referendum in Italy could result in Prime Minister Matteo Renzi's political demise.

Consequently, with the political leaders in these four founding states of the European Union (Merkel, Renzi, Hollande and Rutte) finding themselves in the midst of contentious election campaigns, none of them will be any mood to make any concessions to a British government which has basically declared war on two central tenets of the European project.

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What is also intriguing is the question whether the United Kingdom, given the Conservative government's increasing hostility to the jurisdiction of the European Court of Justice (ECJ), will start defying the jurisdiction of the ECJ or whether these are merely fighting words intended for domestic consumption by Leave voters concerned about issues of national sovereignty. Only time can tell, but the Prime Minister's conference speech has certainly raised the stakes in the duel of nerves between London and Brussels.

Gina Miller *versus* Secretary of State David Davis

That said, political leaders on both sides of the Channel are not the only ones concerning themselves with the Brexit aftermath. Last week, the Queen's Bench Division of the High Court of England & Wales heard a lawsuit filed against the Secretary of State for Exiting the European Union (David Davis: "the Secretary of State") . The principal issue in this case (in which leading barristers in EU law are appearing on behalf of London-based investment banker Gina Miller: "the Lead Claimant") is whether the UK government is authorized to officially notify the European Council (the heads of state and government of all EU member states) of the United Kingdom's intention to withdraw from the European Union (under Article 50 of the Treaty of European Union). For purposes of brevity, I will only concentrate on the arguments advanced on behalf of and against the Lead Claimant's lawsuit.

What is the Lead Claimant asking for?

The Lead Claimant is requesting a declaration by the High Court that the United Kingdom Government cannot exercise its authority to trigger Article 50 without prior approval of both Houses of Parliament.

Why is this so significant?

Because in contrast to the results of the 23 June referendum, there is a decisive majority (up to three-quarters according to some political analysts, based on prior declarations during the referendum campaign) of Members of Parliament (MPs) which supports Britain retaining its EU membership.

These MPs are also thought more likely to support "soft Brexit" option, whether within the framework of the European Free Trade Association (EFTA; which itself seems to be rather reluctant about the prospect of the UK radically changing the balance of power within that organization) or outside it. This is what is also coloquially referred to as the Norway/Switzerland model.

Compare that to the recent pronouncements of Prime Minister May and senior cabinet ministers (Foreign Secretary Boris Johnson, Home Secretary Amber Rudd, Brexit Secretary David Davis and International Trade Secretary Liam Fox) on hot-button issues including Brexit, future relations with EU states, immigration and crime, and you will see why Parliament's involvement could certainly throw a major spanner into the works of proponents of the United Kingdom's swift withdrawal from the European Union.

In support of her position, the Lead Claimant employs the following central arguments:

1. The European Union (Referendum) Act 2015, the piece of legislation on the basis of which the referendum was triggered, did not specify any steps to be taken in the contingency that the Leave option emerged victorious. In contrast, the Act of Parliament underpinning the 2011 referendum on the introduction of the Alternative Vote system specified that in the event of the Alternative Vote option winning the

referendum, that electoral system would replace the First Past the Post electoral system across the United Kingdom. No such provisions were made in the European Union (Referendum) Act 2015.

2. Due to the ambiguity regarding the precise legal consequences of the outcome, there was no "clear understanding" for the event that the Leave option carried a majority in the referendum – contrary to what is now claimed by the Secretary of State.

3. The European Communities Act 1972 (ECA 1972) is a constitutional-level Act of Parliament whose purpose was to enable the UK to become an EU (then EEC) member and give direct effect to European Union law without the need for further legislation. In addition, other important Acts of Parliament (including the Competition Act 1998, the Communications Act 2003 and the European Parliamentary Elections Act 2002) operate with an EU legal framework in mind (and contain provisions tying UK national law to European Union law). In support of her proposition regarding the constitutional character of the ECA 1972, the Lead Claimant also cites cases such as Factortame (No. 2) and Thorburn v Sunderland City Council.

4. Given that there is no express UK statutory provision (like an Act of Parliament) for the triggering of Article 50 by the United Kingdom Government, the only valid route would be via invocation of the royal prerogative – in what the Lead Claimant essentially describes as carefully delineated circumstances. The Lead Claimant argues (on the basis of the Laker Airways case) that by triggering the Article 50 notification, the UK Government would violate the actual intent and guiding policy of the ECA 1972, which is to ensure membership of the European Union and guarantee rights under EU law (including access to the European Court of Justice) to all British citizens. Eliminating the ECJ's jurisdiction, so it is argued, will also involve a "major constitutional change".

The arguments advanced by the Secretary of State can be summarized as follows:

1. The people of the United Kingdom have voted to leave the European Union. The United Kingdom Government needs to now give formal effect to this decision by executing the Article 50 notification. The lawyers for the Secretary of State also dispute the characterization of the referendum as "advisory" or "consultative" and state that the decision represents the will of the British people. *However, it is significant to note that there is no tradition of national referendums in the United Kingdom. Including the Brexit referendum, there have only been three nationwide plebiscites (the 1975 Common Market referendum, the 2011 Alternative Vote referendum and the 2016 Brexit referendum).*

2. This is particularly so, as the United Kingdom Government (in parliamentary statements and media availabilities) made it very clear that the result of the referendum would be respected, regardless of outcome. Therefore, the British people have a legitimate expectation that the referendum will result in the withdrawal of the United Kingdom from the European Union.

3. Further, the notification of withdrawal is not inconsistent with the objectives of the ECA 1972 – especially as none of its provisions ever stipulated any restrictions on the United Kingdom's capacity to withdraw from the Union.

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4. Similarly, the European Union (Referendum) Act 2015 (legally authorizing the national referendum on 23 June 2016) did not stipulate any further steps to be taken in the event of a Leave majority because the United Kingdom Government had clearly established that it would respect the final outcome of the referendum. Additionally, Parliament did not impose any restrictions on the activation of Article 50 TEU when it ratified the Lisbon Treaty – wheras express limitations were introduced in the case of parliamentary controls over certain treaties. The European Union Act 2011 contains a range of scenarios triggering a referendum or the tabling of an Act of Parliament, in circumstances which would previously merely have necessitated the use of the royal prerogative. Had Parliament wanted to restrict the use of the royal prerogative by the United Kingdom Government, it would have expressly done so.
5. Additionally, the European Union is to be treated as any international organization – hence, the Accession Treaty (the 1972 agreement with which the United Kingdom joined the then-European Economic Community in January 1973) is one of many international agreements that can be terminated under the standard principles of international law and falls under the scope of the royal prerogative. In this context, the Secretary of State also cites several pieces of previous legislation that *did contain* express provisions governing the use of the royal prerogative. **The Lead Claimant contends in response to this argument that the United Kingdom's withdrawal is not just an affair located on the "international law plane", but will have major constitutional and legal implications for the country.**

6. The Secretary of State also argues that the use of the royal prerogative without Parliament's involvement is perfectly normal in international law – with the government often making agreements under its power to conduct foreign relations and only later seeking to adopt implementing legislation. **The Lead Claimant responds to that assertion that she does not seek to eliminate the UK Government's treaty-making powers, but**

7. It is further maintained in the Secretary of State's submissions that the Article 50 notification via the use of the royal prerogative does not pre-empt the discussions about the United Kingdom's future constitutional and legal settlement after leaving the European Union. Much will depend on the scope, character and elements of the overall agreement made between the European Union and a departing United Kingdom. Similarly, it will be for Parliament to consider the concrete avenues to be taken by the country on issues like immigration control, competition law, communications and the like. **In response to this contention, the Lead Claimant asserts that central pieces of legislation tied to EU law will be fatally undermined by the Article 50 notification and the resulting withdrawal from the European Union.**

8. The Secretary of State then pivots to the argument that the claim is non-justiciable, as the conduct of foreign affairs is traditionally within the realm of the United Kingdom Government's authority. **This is contested by the Lead Claimant, who advances the argument that the court is indeed authorized to decide on cases involving a question related to the potentially unlawful exercise of the royal prerogative power. The fact that Brexit involves major implications for government policy is not as relevant as the legal character of this question.**

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9. It is also claimed that requiring parliamentary approval prior to the Article 50 notification would represent an undue judicial interference with the rights of Parliament.

When will we know more?
At the time this blog entry was published, the High Court had indicated that they would issue a decision at the earliest available opportunity. An update on the decision will be provided here,once it has been disseminated by the court.

What does Parliament have to say on this matter?
Whilst no comment on this case as such has been forthcoming from Parliament as an institution, Parliament has tried to jealously guard its ability to shape the precise contours of the United Kingdom's withdrawal from the European Union. In July, just a few weeks after the referendum result, it published a report insisting on its role in the scrutiny of any negotiations occurring with the European Union, calling it "constitutionally appropriate that Parliament should take the decision to act following the referendum". (para 27, House of Lords Select Committee on the Constitution, 4th Report of Session 2016/17, *The Invoking of Article 50*) and also reminded the UK Government of its view that the proverbial buck stops with Parliament (para 7, House of Lords European Union Committee, 1st Report of Session 2016/17, *Scrutinising Brexit: the role of Parliament*).

Will Brexit be stopped by the courts?
Unlikely. It would indeed be extraordinary for the courts to coutermand a decision taken by a national referendum. However, the case is about the appropriate role for Parliament in this entire process – and whether it ought to be involved from start to finish, and (if so) in what precise manner. Apparently, based on the latest media reports, much of this will depend on whether Brexit is perceived to be a decision which is reversible or entrenched.

Given the high threshold that the United Kingdom would have to clear in order to be readmitted as a member state of the European Union once it leaves (and that also needs to bear in mind that the UK would most likely not be given any opt-outs or concessions, such as the ones it has been able to negotiate since the Thatcher era), an argument can certainly be made that Brexit does indeed mean Brexit – and therefore, a termination of erstwhile close political, economic, legal and institutional ties with the remainder of the European Union.

This case will be quite significant in terms interpreting the precise scope of the royal prerogative, and will (especially if it is carried all the way to the UK Supreme Court) have a major impact on executive-legislative relations – a theme that has been prevalent in the discussion among UK constititutional scholars since the Blair Years (and especially the authorization of the Iraq War).